

## SUBCHAPTER A—ORGANIZATION, PROCEDURES AND RULES OF PRACTICE

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AUTHORITY: 5 U.S.C. 552(a)(1); 15 U.S.C. 46(g).

SOURCE: 41 FR 54483, Dec. 14, 1976, unless otherwise noted.

#### § 0.1 The Commission.

The Federal Trade Commission is an independent administrative agency which was organized in 1915 pursuant to the Federal Trade Commission Act of 1914 (38 Stat. 717, as amended; 15 U.S.C. 41–58). It is responsible for the administration of a variety of statutes which, in general, are designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services. It is composed of five members appointed by the President and confirmed by the Senate for terms of seven years.

#### § 0.2 Official address.

The principal office of the Commission is at Washington, DC. All communications to the Commission should be addressed to the Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, unless otherwise specifically directed. The Commission's Web site address is *www.ftc.gov*.

[63 FR 71582, Dec. 29, 1998, as amended at 65 FR 78408, Dec. 15, 2000]

#### § 0.3 Hours.

Principal and field offices are open on each business day from 8:30 a.m. to 5 p.m.

#### § 0.4 Laws administered.

The Commission exercises enforcement and administrative authority under the Federal Trade Commission Act (15 U.S.C. 41–58), Clayton Act (15 U.S.C. 12–27), Robinson-Patman Act (15 U.S.C. 13–13b, 21a), Webb-Pomerene (Export Trade) Act (15 U.S.C. 61–66), Packers and Stockyards Act (7 U.S.C. 181–229), Wool Products Labeling Act of 1939 (15 U.S.C. 68–68j), Lanham Trade-Mark Act (15 U.S.C. 1064), Fur Products Labeling Act (15 U.S.C. 69–69j), Textile Fiber Products Identification Act (15 U.S.C. 70–70k), Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1331–1340), Fair Packaging and Labeling Act (15 U.S.C. 1451–1461), Truth in Lending Act (15 U.S.C. 1601–1667f), Fair Credit Reporting Act (15 U.S.C. 1681–1681u), Fair Credit Billing Act (15 U.S.C. 1666–1666j), Equal Credit Opportunity Act (15 U.S.C. 1691–1691f), Fair Debt Collection Practices Act (15 U.S.C. 1692–1692o), Electronic Fund Transfer Act (15 U.S.C. 1693–1693r), Hobby Protection Act (15 U.S.C. 2101–2106), Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301–2312, 45–58), Energy Policy and Conservation Act (42 U.S.C. 6201–6422, 15 U.S.C. 2008), Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a), Petroleum Marketing Practices Act (15 U.S.C. 2801–2841), Comprehensive Smokeless Tobacco Health Education Act of 1986 (15 U.S.C. 4401–4408), Telephone Disclosure and Dispute Resolution Act of 1992 (15 U.S.C. 5701–5724), Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101–6108), International Antitrust Enforcement Assistance Act of 1994 (15 U.S.C. 46, 57b–1, 1311–1312, 6201 & note, 6202–6212), Credit Repair Organizations Act (15 U.S.C. 1679–1679j), Children's Online Privacy Protection Act (15 U.S.C. 6501–6506), Identity Theft Assumption and Deterrence Act of 1998 (18

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U.S.C. 1028 note), Gramm-Leach-Bliley Act (15 U.S.C. 6801-6809), and other Federal statutes.

[65 FR 78408, Dec. 15, 2000]

### **§ 0.5 Laws authorizing monetary claims.**

The Commission is authorized to entertain monetary claims against it under three statutes. The Federal Tort Claims Act (28 U.S.C. 2671-2680) provides that the United States will be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful acts or omissions of its employees acting within the scope of their employment or office. The Military Personnel and Civilian Employees Claims Act of 1964 (31 U.S.C. 3701, 3721) authorizes the Commission to compensate employees' claims for damage to or loss of personal property incident to their service. The Equal Access to Justice Act (5 U.S.C. 504 and 28 U.S.C. 2412) provides that an eligible prevailing party other than the United States will be awarded fees and expenses incurred in connection with any adversary adjudicative and court proceeding, unless the adjudicative officer finds that the agency was substantially justified or that special circumstances make an award unjust. In addition, eligible parties, including certain small businesses, will be awarded fees and expenses incurred in defending against an agency demand that is substantially in excess of the final decision of the adjudicative officer and is unreasonable when compared with such decision under the facts and circumstances of the case, unless the adjudicative officer finds that the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Questions may be addressed to the Office of the General Counsel, (202) 326-2462.

[63 FR 36340, July 6, 1998]

### **§ 0.6 [Reserved]**

### **§ 0.7 Delegation of functions.**

The Commission, under the authority provided by Reorganization Plan No. 4 of 1961, may delegate, by published order or rule, certain of its functions to

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a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, and retains a discretionary right to review such delegated action upon its own initiative or upon petition of a party to or an intervenor in such action.

[65 FR 78408, Dec. 15, 2000]

### **§ 0.8 The Chairman.**

The Chairman of the Commission is designated by the President, and, subject to the general policies of the Commission, is the executive and administrative head of the agency. He presides at meetings of and hearings before the Commission and participates with other Commissioners in all Commission decisions. Attached to the Office of the Chairman, and reporting directly to him, and through him to the Commission, are the following staff units:

(a) The Office of Public Affairs, which furnishes information concerning Commission activities to news media and the public; and

(b) the Office of Congressional Relations, which coordinates all liaison activities with Congress.

[50 FR 53303, Dec. 31, 1985]

### **§ 0.9 Organization structure.**

The Federal Trade Commission comprises the following principal units: Office of the Executive Director; Office of the General Counsel; Office of the Secretary; Office of the Inspector General; Office of the Administrative Law Judges; Office of International Affairs; Bureau of Competition; Bureau of Consumer Protection; Bureau of Economics; and the Regional Offices.

[72 FR 9434, Mar. 2, 2007]

### **§ 0.10 Office of the Executive Director.**

The Executive Director, under the direction of the Chairman, is the chief operating official who develops and implements management and administrative policies, programs and directives for the Commission. The Executive Director works closely with the Bureaus on strategic planning and assessing the management and resource implications of any proposed action. In addition, the Executive Director manages the Commission's facilities and administrative

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services, financial management, information technology, and human resources.

[65 FR 78408, Dec. 15, 2000]

### § 0.11 Office of the General Counsel.

The General Counsel is the Commission's chief law officer and adviser, who renders necessary legal services to the Commission, represents the Commission in the Federal and State courts, advises the Commission and other agency officials and staff with respect to questions of law and policy, including advice with respect to legislative matters and ethics, and responds to requests and appeals filed under the Freedom of Information and Privacy Acts and to intra- and intergovernmental access requests.

[65 FR 78408, Dec. 15, 2000]

### § 0.12 Office of the Secretary.

The Secretary is responsible for the minutes of Commission meetings and is the legal custodian of the Commission's seal, property, papers, and records, including legal and public records. The Secretary, or in the Secretary's absence an Acting Secretary designated by the Commission, signs Commission orders and official correspondence. In addition, the Secretary is responsible for the publication of all Commission actions that appear in the FEDERAL REGISTER and for the publication of *Federal Trade Commission Decisions*.

[65 FR 78408, Dec. 15, 2000]

### § 0.13 Office of the Inspector General.

The Office of Inspector General (OIG) was established within the Federal Trade Commission in 1989 as required by the Inspector General Act Amendments of 1988 (5 U.S.C. app. 3). The OIG promotes the economy, efficiency and effectiveness of FTC programs and operations. To this end, the OIG independently conducts audits and investigations to find and prevent fraud, waste, and abuse within the agency.

[65 FR 78408, Dec. 15, 2000]

### § 0.14 Office of Administrative Law Judges.

Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice. The administrative law judges also serve as presiding officers assigned to conduct rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act as amended and other rulemaking proceedings as directed. The Chief Administrative Law Judge also serves as the Chief Presiding Officer. Administrative law judges are appointed under the authority and subject to the prior approval of the Office of Personnel Management.

[54 FR 19885, May 9, 1989, as amended at 65 FR 78409, Dec. 15, 2000]

### § 0.15 [Reserved]

### § 0.16 Bureau of Competition.

The Bureau is responsible for enforcing Federal antitrust and trade regulation laws under section 5 of the Federal Trade Commission Act, the Clayton Act, and a number of other special statutes that the Commission is charged with enforcing. The Bureau's work aims to preserve the free market system and assure the unfettered operation of the forces of supply and demand. Its activities seek to ensure price competition, quality products and services and efficient operation of the national economy. The Bureau carries out its responsibilities by investigating alleged law violations, and recommending to the Commission such further action as may be appropriate. Such action may include injunctive and other equitable relief in Federal district court, complaint and litigation before the agency's administrative law judges, formal nonadjudicative settlement of complaints, trade regulation rules, or reports. The Bureau also conducts compliance investigations and initiates proceedings for civil penalties to assure compliance with final Commission orders dealing with competition and trade restraint matters. The

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Bureau's activities also include business and consumer education and staff advice on competition laws and compliance, and liaison functions with respect to foreign antitrust and competition law enforcement agencies and organizations, including requests for international enforcement assistance.

[65 FR 78409, Dec. 15, 2000]

### §0.17 Bureau of Consumer Protection.

The Bureau investigates unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act as well as potential violations of numerous special statutes which the Commission is charged with enforcing. It prosecutes before the agency's administrative law judges alleged violations of law after issuance of a complaint by the Commission or obtains through negotiation consented-to orders, which must be accepted and issued by the Commission. In consultation with the General Counsel, the Bureau may also seek injunctive or other equitable relief under section 13(b) of the Federal Trade Commission Act. The Bureau participates in trade regulation rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act and other rulemaking proceedings under statutory authority. It investigates compliance with final orders and trade regulation rules and seeks civil penalties or consumer redress for their violation, as well as injunctive and other equitable relief under section 13(b) of the Act. In addition, the Bureau seeks to educate both consumers and the business community about the laws it enforces, and to assist and cooperate with other state, local, foreign, and international agencies and organizations in consumer protection enforcement and regulatory matters. The Bureau also maintains the agency's public reference facilities, where the public may inspect and copy a current index of opinions, orders, statements of policy and interpretations, staff manuals and instructions that affect any member of the public, and other public records of the Commission.

[65 FR 78409, Dec. 15, 2000]

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### §0.18 Bureau of Economics.

The bureau aids and advises the Commission concerning the economic aspects of all of its functions, and is responsible for the preparation of various economic reports and surveys. The bureau provides economic and statistical assistance to the enforcement bureaus in the investigation and trial of cases.

[41 FR 54483, Dec. 14, 1976. Redesignated at 45 FR 36341, May 29, 1980, and amended at 50 FR 53303, Dec. 31, 1985]

### §0.19 The Regional Offices.

(a) These offices are investigatory arms of the Commission, and have responsibility for investigational, trial, compliance, and consumer educational activities as delegated by the Commission. They are under the general supervision of the Office of the Executive Director, and clear their activities through the appropriate operating Bureaus.

(b) The names, geographic areas of responsibility, and addresses of the respective regional offices are as follows:

(1) *Northeast Region* (located in New York City, New York), covering Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Puerto Rico. Federal Trade Commission, One Bowling Green, Suite 318, New York, New York 10004.

(2) *Southeast Region* (located in Atlanta, Georgia), covering Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee. Federal Trade Commission, Suite 5M35, Midrise Building, 60 Forsyth Street, SW., Atlanta, Georgia 30303.

(3) *East Central Region* (located in Cleveland, Ohio), covering Delaware, District of Columbia, Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia. Federal Trade Commission, Eaton Center, Suite 200, 1111 Superior Avenue, Cleveland, Ohio 44114.

(4) *Midwest Region* (located in Chicago, Illinois), covering Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin. Federal Trade Commission, 55 East Monroe Street, Suite 1860, Chicago, Illinois 60603-5701.

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(5) *Southwest Region* (located in Dallas, Texas), covering Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. Federal Trade Commission, 1999 Bryan Street, Suite 2150, Dallas, Texas 75201.

(6) *Northwest Region* (located in Seattle, Washington), covering Alaska, Idaho, Montana, Oregon, Washington, and Wyoming. Federal Trade Commission, 915 Second Avenue, Suite 2896, Seattle, Washington 98174.

(7) *Western Region* (located in San Francisco and Los Angeles, California), covering Arizona, California, Colorado, Hawaii, Nevada, and Utah.

(i) San Francisco Office: Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, California 94103.

(ii) Los Angeles Office: Federal Trade Commission, 10877 Wilshire Boulevard, Suite 700, Los Angeles, California 90024.

(c) Each of the regional offices is supervised by a Regional Director, who is available for conferences with attorneys, consumers, and other members of the public on matters relating to the Commission's activities.

[41 FR 54483, Dec. 14, 1976, as amended at 42 FR 27218, May 27, 1977; 43 FR 754, Jan. 4, 1978; 43 FR 6579, Feb. 15, 1978. Redesignated at 45 FR 36341, May 29, 1980, as amended at 50 FR 53303, Dec. 31, 1985; 63 FR 71582, Dec. 29, 1998; 64 FR 71284, Dec. 21, 1999; 65 FR 78409, Dec. 15, 2000]

### § 0.20 Office of International Affairs.

The Office of International Affairs (OIA) comprises international anti-trust, international consumer protection, and international technical assistance. OIA is responsible for designing and implementing the Commission's international program, which provides support and advice to the Bureaus of Competition and Consumer Protection with regard to the international aspects of investigation and prosecution of unlawful conduct. OIA builds cooperative relationships between the Commission and foreign authorities; works closely with Bureau personnel to recommend agency priorities and policies and works, through bilateral relationships and multilateral organizations, to promote those policies internationally; and implements Commission policy and participation in

the competition and consumer protection aspects of trade fora and negotiations, such as the U.S. inter-agency delegations negotiating bilateral and multilateral free trade agreements. OIA works with authorized funding sources to develop and implement competition and consumer protection technical assistance programs.

[72 FR 9434, Mar. 2, 2007]

## PART 1—GENERAL PROCEDURES

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AUTHORITY: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

SOURCE: 32 FR 8444, June 13, 1967, unless otherwise noted.

## Subpart A—Industry Guidance

### ADVISORY OPINIONS

#### § 1.1 Policy.

(a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.

(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or

(2) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

(b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. Hypothetical questions will not be answered, and a request for advice will ordinarily be considered inappropriate where:

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(1) The same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or

(2) An informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

[44 FR 21624, Apr. 11, 1979; 44 FR 23515, Apr. 20, 1979, as amended at 54 FR 14072, Apr. 7, 1989]

### § 1.2 Procedure.

(a) Application. The request for advice or interpretation should be submitted in writing (one original and two copies) to the Secretary of the Commission and should: (1) State clearly the question(s) that the applicant wishes resolved; (2) cite the provision of law under which the question arises; and (3) state all facts which the applicant believes to be material. In addition, the identity of the companies and other persons involved should be disclosed. Letters relating to unnamed companies or persons may not be answered. Submittal of additional facts may be requested prior to the rendering of any advice.

(b) Compliance matters. If the request is for advice as to whether the proposed course of action may violate an outstanding order to cease and desist issued by the Commission, such request will be considered as provided for in § 2.41 of this chapter.

[44 FR 21624, Apr. 11, 1979, as amended at 44 FR 40638, July 12, 1979]

### § 1.3 Advice.

(a) On the basis of the materials submitted, as well as any other information available, and if practicable, the Commission or its staff will inform the requesting party of its views.

(b) Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commis-

sion will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(c) Advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding.

[44 FR 21624, Apr. 11, 1979]

### § 1.4 Public disclosure.

Written advice rendered pursuant to this section and requests therefor, including names and details, will be placed in the Commission's public record immediately after the requesting party has received the advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. A request for confidential treatment of information submitted in connection with the questions should be made separately.

[44 FR 21624, Apr. 11, 1979]

## INDUSTRY GUIDES

### § 1.5 Purpose.

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

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### § 1.6 How promulgated.

Industry guides<sup>1</sup> are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor, by any interested person or group, when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission. In connection with the promulgation of industry guides, the Commission at any time may conduct such investigations, make such studies, and hold such conferences or hearings as it may deem appropriate. All or any part of any such investigation, study, conference, or hearing may be conducted under the provisions of subpart A of part 2 of this chapter.

deceptive acts or practices in or affecting commerce. Such rules may include requirements prescribed for the purpose of preventing such acts or practices. A violation of a rule shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of that Act, unless the Commission otherwise expressly provides in its rule. However, the respondent in an adjudicative proceeding may show that his conduct does not violate the rule or assert any other defense to which he is legally entitled.

(b) The Commission at any time may conduct such investigations, make such studies and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of subpart A of part 2 of this chapter.

[46 FR 26288, May 12, 1981]

### Subpart B—Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act

AUTHORITY: 15 U.S.C. 46; 15 U.S.C. 57a; 5 U.S.C. 552; sec. 212(a), Pub. L. 104–121, 110 Stat. 857 (5 U.S.C. 601 note).

### § 1.7 Scope of rules in this subpart.

The rules in this subpart apply to and govern proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act. Such rules shall be known as trade regulation rules. All other rulemaking proceedings shall be governed by the rules in subpart C, except as otherwise required by law or as otherwise specified in this chapter.

[46 FR 26288, May, 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

### § 1.8 Nature, authority and use of trade regulation rules.

(a) For the purpose of carrying out the provisions of the Federal Trade Commission Act, the Commission is empowered to promulgate trade regulation rules which define with specificity acts or practices which are unfair or

### § 1.9 Petitions to commence trade regulation rule proceedings.

Trade regulation rule proceedings may be commenced by the Commission upon its own initiative or pursuant to written petition filed with the Secretary by any interested person stating reasonable grounds therefor. If the Commission determines to commence a trade regulation rule proceeding pursuant to the petition, the petitioner shall be mailed a copy of the public notices issued under §§1.10, 1.11 and 1.12. Any person whose petition is not deemed by the Commission sufficient to warrant commencement of a rulemaking proceeding shall be notified of that determination and may be given an opportunity to submit additional data.

[46 FR 26288, May, 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

### § 1.10 Advance notice of proposed rule-making.

(a) Prior to the commencement of any trade regulation rule proceeding, the Commission shall publish in the FEDERAL REGISTER an advance notice of such proposed proceeding.

(b) The advance notice shall:

(1) Contain a brief description of the area of inquiry under consideration, the objectives which the Commission

<sup>1</sup>In the past, certain of these have been promulgated and referred to as trade practice rules.

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seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(2) Invite the response of interested persons with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(c) The advance notice shall be submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives.

(d) The Commission may, in addition to publication of the advance notice, use such additional mechanisms as it considers useful to obtain suggestions regarding the content of the area of inquiry before publication of an initial notice of proposed rulemaking pursuant to § 1.11.

[46 FR 26288, May, 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

### § 1.11 Commencement of a rulemaking proceeding.

(a) *Initial notice.* A trade regulation rule proceeding shall commence with an initial notice of proposed rulemaking. Such notice shall be published in the FEDERAL REGISTER not sooner than 30 days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives. The initial notice shall include:

(1) The text of the proposed rule including any alternatives which the Commission proposes to promulgate;

(2) Reference to the legal authority under which the rule is proposed;

(3) A statement describing with particularity the reason for the proposed rule;

(4) An invitation to all interested persons to propose issues which meet the criteria of § 1.13(d)(1)(i) for consideration in accordance with § 1.13 (d)(5) and (d)(6);

(5) An invitation to all interested persons to comment on the proposed rule; and

(6) A statement of the manner in which the public may obtain copies of the preliminary regulatory analysis.

(b) *Preliminary regulatory analysis.* Except as otherwise provided by statute, the Commission shall, when commencing a rulemaking proceeding, issue a preliminary regulatory analysis which shall contain:

(1) A concise statement of the need for, and the objectives of, the proposed rule;

(2) A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law;

(3) For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule; and

(4) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

[46 FR 26288, May, 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985; 63 FR 36340, July 6, 1998]

### § 1.12 Final notice.

A final notice of proposed rulemaking shall be published in the FEDERAL REGISTER and, to the extent practicable, otherwise made available to interested persons. The final notice shall include:

(a) Designated issues, unless there are none, which are to be considered in accordance with § 1.13 (d)(5) and (d)(6);

(b) The time and place of an informal hearing;

(c) Instructions to interested persons seeking to make oral presentations;

(d) A requirement that interested persons who desire to avail themselves of the procedures of § 1.13 (d)(5) and (d)(6) with respect to any issue designated in paragraph (a) of this section must identify their interests with respect to those issues in such manner as may be established by the presiding officer; and

(e) an incorporation by reference of the contents of the initial notice.

[40 FR 33966, Aug. 13, 1975, as amended at 50 FR 53303, Dec. 31, 1985]

**§ 1.13 Rulemaking proceeding.**

(a) *Written comments.* After commencement of a trade regulation rule proceeding, the Commission shall accept written submissions of data, views, and arguments on all issues of fact, law, and policy. The initial notice shall specify the deadline for filing written comments under this subsection.

(b) *Comments proposing issues subject to the procedures of § 1.13 (d)(5) and (d)(6).* Interested persons may propose issues for consideration in accordance with § 1.13 (d)(5) and (d)(6) until thirty (30) days after the close of the written comment period or such other period as the Commission may establish in the initial notice.

(c) *Presiding officer—(1) Assignment.* Upon commencement of a proposed trade regulation rule proceeding, a presiding officer shall be appointed by the Chief Presiding Officer or, when the Commission or one or more of its members serves as presiding officer, by the Commission.

(2) *Powers of the presiding officer.* The presiding officer shall be responsible for the orderly conduct of the rulemaking proceeding and the maintenance of the rulemaking and public records until the close of the postrecord comment period. He shall have all powers necessary to that end including the following:

(i) To publish a final notice in accordance with § 1.12 or issue any other public notice that may be necessary for the orderly conduct of the rulemaking proceeding;

(ii) To designate or modify, issues for consideration in accordance with § 1.13 (d)(5) and (d)(6);

(iii) To set the time and place of the informal hearing and to change any time periods prescribed in this subpart;

(iv) To prescribe rules or issue rulings to avoid unnecessary costs or delay. Such rules or rulings may include, but are not limited to, the imposition of reasonable time limits on each person's oral presentation; and requirements that any examination; including cross-examination, which a person may be entitled to conduct or have conducted be conducted by the presiding officer on behalf of that person in such a manner as the presiding

officer determines to be appropriate and to be required for a full and true disclosure with respect to any issue designated for consideration in accordance with § 1.13 (d)(5) and (d)(6);

(v) To make rules and rulings limiting the representation of interested persons for the purpose of examination, including cross-examination, and governing the manner in which such examination is limited, including the selection of a representative from among a group of persons with the same or similar interests;

(vi) To require that oral presentations at the informal hearing or responses to written questions be under oath;

(vii) To require that oral presentations at the informal hearing be submitted in writing in advance of presentation;

(viii) To certify questions to the Commission for its determination; and

(ix) To rule upon all motions or petitions of interested persons, which motions or petitions must be filed with the presiding officer until the close of the postrecord comment period.

(3) *Review of rulings by the presiding officer—(i) Review after certification by the presiding officer.* Except as otherwise provided in paragraph (c)(3)(ii) of this section, applications for review of a ruling will not be entertained by the Commission prior to its review of the record pursuant to § 1.14, unless the presiding officer certifies in writing to the Commission that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate review of the ruling may materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy. Within five (5) days after a ruling by the presiding officer, any interested person may petition the presiding officer for certification of that ruling to the Commission. Certification of a ruling shall not stay the rulemaking proceeding unless the presiding officer or the Commission shall so order. Submissions to the Commission not to exceed fifteen (15) pages may be made within ten (10) days of the presiding officer's certification. All such filings shall be a part of the rulemaking record. The

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Commission may thereupon, in its discretion, permit the appeal. Commission review, if permitted, will be based on the application for review and any additional submissions, without oral argument or further briefs, unless otherwise ordered by the Commission.

(ii) *Review without certification by the presiding officer.* Within ten (10) days after publication of the final notice, any interested person may petition the Commission for addition, modification or deletion of a designated issue, accompanied by a filing not to exceed fifteen (15) pages. Additional submissions on the issue by other interested persons, not to exceed fifteen (15) pages, may be made within twenty (20) days of the publication of the final notice. The Commission may thereupon, in its discretion, permit the appeal. Commission review, if permitted, will be based on the petition and any additional submissions, without oral argument or further briefs, unless otherwise ordered by the Commission. A petition hereunder shall not stay the rulemaking proceeding unless the presiding officer or the Commission shall so order. All petitions filed under this paragraph shall be a part of the rulemaking record. Notice of the filing of any such petition may be obtained from the Office of the Secretary of the Commission. In the event any designated issue is added or substantially modified by the Commission, interested persons shall be given a further opportunity to identify their interests with respect to those issues.

(4) *Substitution of presiding officer.* In the event of the substitution of a new presiding officer for the one originally appointed, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(5) *Organization.* In the performance of their rulemaking functions, presiding officers shall be responsible to the chief presiding officer who shall not be responsible to any other officer or employee of the Commission.

(6) *Ex parte communications.* Except as required for the disposition of *ex parte* matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(d) *Informal hearings.* An informal hearing with the opportunity for oral presentations on all issues shall be conducted by the presiding officer. In addition, if an issue is designated pursuant to these rules for consideration in accordance with § 1.13(d) (5) and (6), the informal hearing on such issues shall be conducted in accordance with those paragraphs. For all other issues the presiding officer may in his discretion employ, in whole or in part, the procedures of those paragraphs.

(1) *Nature of issues for consideration in accordance with § 1.13 (d)(5) and (d)(6)—*

(i) *Issues that must be considered in accordance with § 1.13(d)(5) and (d)(6).* The only issues that must be designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section are disputed issues of fact that are determined by the Commission or the presiding officer to be material and necessary to resolve.

(ii) *Issues that may be considered in accordance with § 1.13(d)(5) and (d)(6).* The Commission and the presiding officer retain the power to designate any other issues for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section.

(2) *Addition or modification of issues for consideration in accordance with § 1.13(d)(5) and (d)(6).* The presiding officer may at any time on his own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to § 1.12(a). No such petition shall be considered unless good cause is shown why any such proposed issue was not proposed pursuant to § 1.13(b).

(3) *Identification of interests.* Not later than twenty (20) days after publication of the final notice each interested person who desires to avail himself of the procedures of paragraphs (d)(5) and (d)(6) of this section shall notify the presiding officer in writing of his particular interest with respect to each issue designated for consideration in accordance with those subsections. In the event that new issues are designated, each interested person shall promptly notify the presiding officer of his particular interest with respect to each such issue.

(4) *Examination and cross-examination by the presiding officer.* The presiding officer may conduct any examination, including cross-examination, to which a person may be entitled. For that purpose he may require submission of written requests for presentation of questions to any person making oral presentations and shall determine whether to ask such questions or any other questions. All requests for presentation of questions shall be placed in the rulemaking record.

(5) *Examination, cross-examination, and the presentation of rebuttal submissions by interested persons—(i) In general.* The presiding officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section. Examination, including, cross-examination, and the presentation of rebuttal submissions, shall be allowed to the extent to which it is appropriate and is required for a full and true disclosure with respect to those issues. Requests for an opportunity to examine, including cross-examine, or to present rebuttal submissions, shall be accompanied by a specific justification therefor. In determining whether or not to grant such requests, the presence of the following circumstances indicate that such requests should be granted:

(A) An issue for examination including cross-examination, or the presentation of rebuttal submissions, is an issue of specific in contrast to legislative fact.

(B) A full and true disclosure with respect to the issue can only be achieved through examination including cross-examination rather than through rebuttal submissions or the presentation of additional oral submissions.

(C) Circumstantial guarantees of the trustworthiness of a presentation do not exist.

(D) The particular presentation is required for the resolution of a designated issue.

(ii) *Selection of representatives for cross-examination.* After consideration of the information supplied in response to the final notice, the presiding officer

shall identify groups of persons with the same or similar interests in the proceeding. Any such group may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative then the presiding officer may select a representative of each such group.

(iii) *Inability to select representative for examination, including cross-examination.* No person shall be denied the opportunity to conduct or have conducted, examination, including cross-examination, under paragraph (d)(5)(i) of this section if he is a member of a group as described in paragraph (d)(5)(ii) of this section and is unable to agree upon group representation with other group members after a good faith effort to do so and seeks to present substantial and relevant issues which will not be adequately presented by the group representative. In that event he shall be allowed to conduct or have conducted any examination, including cross-examination, to which he is entitled on issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section and which affect his particular interest.

(6) *Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions.* During the course of the rulemaking proceeding, the presiding officer shall entertain requests from the Commission's staff or any interested person to compel the attendance of persons or the production of documents or to obtain responses to written questions. Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions shall contain a statement showing the general relevancy of the material, information or presentation, and the reasonableness of the scope of the request, together with a showing that such material, information or presentation is not available by voluntary methods and cannot be obtained through examination, including cross-examination, of oral presentations or the presentation of rebuttal submissions, and is appropriate and required

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for a full and true disclosure with respect to the issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section. If the presiding officer determines that a request should be granted, he shall transmit his determination to the Commission which shall determine whether to issue a civil investigative demand under § 2.7(b). Information received in response to such a demand may be disclosed in the rulemaking proceeding subject to an *in camera* order under § 1.18(b).

(e) *Written transcript.* A verbatim transcript shall be made of the informal hearing which transcript shall be placed in the rulemaking record.

(f) *Staff recommendations.* The staff shall make recommendations to the Commission in a report on the rulemaking record. Such report shall contain its analysis of the record and its recommendations as to the form of the final rule.

(g) *Recommended decision.* After publication of the staff report, the presiding officer shall make a recommended decision based upon his or her findings and conclusions as to all relevant and material evidence, and taking into account the staff report. The recommended decision shall be made by the presiding officer who presided over the rulemaking proceeding except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(h) *Postrecord comment.* The staff report and the presiding officer's recommended decision shall be the subject of public comment for a period to be prescribed by the presiding officer at the time the recommended decision is placed in the rulemaking record. The comment period shall be no less than sixty (60) days. The comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer.

(i) *Commission review of the rulemaking record.* The Commission shall review the rulemaking record to determine what form of rule, if any, it should promulgate. During this review process, the Commission may allow persons who have previously participated in

the proceeding to make oral presentations to the Commission, unless it determines with respect to that proceeding that such presentations would not significantly assist it in its deliberations. Presentations shall be confined to information already in the rulemaking record. Requests to participate in an oral presentation must be received by the Commission no later than the close of the comment period under § 1.13(h). The identity of the participants and the format of such presentations will be announced in advance by the Office of Public Information in the Commission's *Weekly Calendar and Notice of "Sunshine" Meetings* and in accordance with the applicable provisions of 5 U.S.C. 552(b) and § 4.15 of the Commission's Rules of Practice. Such presentations will be transcribed verbatim or summarized at the discretion of the Commission and a copy of the transcript or summary and copies of any written communications and summaries of any oral communications relating to such presentations shall be placed on the rulemaking record.

[40 FR 33966, Aug. 13, 1975, as amended at 43 FR 39084, Sept. 1, 1978; 45 36341, May 29, 1980; 45 FR 78628, Nov. 26, 1980; 46 FR 14888, Mar. 3, 1981; 46 FR 26288, May 12, 1981; 50 FR 53303, Dec. 31, 1985; 54 FR 19886, May 9, 1989]

### § 1.14 Promulgation.

(a) The Commission, after review of the rulemaking record, may issue, modify, or decline to issue any rule. Where it believes that it should have further information or additional views of interested persons, it may withhold final action pending the receipt of such additional information or views. If it determines not to issue a rule, it may adopt and publish an explanation for not doing so.

(1) *Statement of Basis and Purpose.* If the Commission determines to promulgate a rule, it shall adopt a Statement of Basis and Purpose to accompany the rule which shall include:

(i) A statement as to the prevalence of the acts or practices treated by the rule;

(ii) A statement as to the manner and context in which such acts or practices are unfair or deceptive;

(iii) A statement as to the economic effect of the rule, taking into account

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the effect on small businesses and consumers;

(iv) a statement as to the effect of the rule on state and local laws; and

(v) A statement of the manner in which the public may obtain copies of the final regulatory analysis.

(2) *Final regulatory analysis.* Except as otherwise provided by statute, if the Commission determines to promulgate a final rule, it shall issue a final regulatory analysis relating to the final rule. Each final regulatory analysis shall contain:

(i) A concise statement of the need for, and the objectives of, the final rule;

(ii) A description of any alternatives to the final rule which were considered by the Commission;

(iii) An analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;

(iv) An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen;

(v) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues; and

(vi) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

(3) *Small entity compliance guide.* For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as “small entity compliance guides.”

(b) In the event the Commission determines, upon its review of the rulemaking record, to propose a revised rule for further proceedings in accordance with this subpart, such proceedings, including the opportunity of interested persons to avail themselves of the procedures of §1.13 (d)(5) and (d)(6), shall be limited to those portions of the revised rule, the subjects and issues of which were not substan-

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tially the subject of comment in response to a previous notice of proposed rulemaking.

(c) The final rule and Statement of Basis and Purpose shall be published in the FEDERAL REGISTER. A rule issued under this subpart shall be deemed promulgated at 3 p.m. Eastern Standard Time on the fourth day after the date on which the final rule and Statement of Basis and Purpose are published in the FEDERAL REGISTER. In the event such day is a Saturday, Sunday or national holiday, then the rule is deemed promulgated at 3 p.m. Eastern Standard Time on the following business day.

[40 FR 33966, Aug. 13, 1975, as amended at 46 FR 26289, May 12, 1981; 50 FR 53304, Dec. 31, 1985; 63 FR 36340, July 6, 1998]

### § 1.15 Amendment or repeal of a rule.

(a) *Substantive amendment or repeal of a rule.* The procedures for substantive amendment to or repeal of a rule are the same as for the issuance thereof.

(b) *Nonsubstantive amendment of a rule.* The Commission may make a non-substantive amendment to a rule by announcing the amendment in the FEDERAL REGISTER.

[46 FR 26289, May 12, 1981]

### § 1.16 Petition for exemption from trade regulation rule.

Any person to whom a rule would otherwise apply may petition the Commission for an exemption from such rule. The procedures for determining such a petition shall be those of subpart C of these rules.

[40 FR 33966, Aug. 13, 1975]

### § 1.17 [Reserved]

### § 1.18 Rulemaking record.

(a) *Definition.* For purposes of these rules the term *rulemaking record* includes the rule, its Statement of Basis and Purpose, the verbatim transcripts of the informal hearing, written submissions, the recommended decision of the presiding officer, and the staff recommendations as well as any public comment thereon, verbatim transcripts or summaries of oral presentations to the Commission any communications

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placed on the rulemaking record pursuant to § 1.18c and any other information which the Commission considers relevant to the rule.

(b) *Public availability.* The rulemaking record shall be publicly available except when the presiding officer, for good cause shown, determines that it is in the public interest to allow any submission to be received *in camera* subject to the provisions of § 4.11 of this chapter.

(c) *Communications to Commissioners and Commissioners' personal staffs—(1) Communications by outside parties.* Except as otherwise provided in this subpart or by the Commission, after the Commission votes to issue an initial notice of proposed rulemaking, comment on the proposed rule should be directed to the presiding officer pursuant to § 1.13. Communications with respect to the merits of that proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment:

(i) *Written communications.* Written communications, including written communications from members of Congress, received within the period for acceptance of initial written comments shall be forwarded promptly to the presiding officer for placement on the rulemaking record. Written communications received after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer, who will determine whether such communications comply with the applicable requirements for written submissions at that stage of the proceeding. Communications that comply with such requirements will be promptly placed on the rulemaking record. Noncomplying communications and all communications received after the time periods for acceptance of written submissions will be placed promptly on the public record.

(ii) *Oral communications.* Oral communications are permitted only when advance notice of such oral communications is published by the Commission's Office of Public Information in its *Weekly Calendar and Notice of "Sunshine" Meetings* and when such oral

communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the rulemaking record together with any written communications and summaries of any oral communications relating to such oral communications. Transcripts or summaries of oral communications which occur after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer together with any written communications and summaries of any oral communications relating to such oral communications. The presiding officer will determine whether such oral communications comply with the applicable requirements for written submissions at that stage of the proceeding. Transcripts or summaries of oral communications that comply with such requirements will be promptly placed on the rulemaking record together with any written communications and summaries of any oral communications relating to such oral communications. Transcripts or summaries of noncomplying oral communications will be promptly placed on the public record together with any written communications and summaries of any oral communications relating to such oral communications. No oral communications are permitted subsequent to the close of the postrecord comment period, except as provided in § 1.13(i). If an oral communication does otherwise occur, the Commissioner or Commissioner advisor will promptly place on the public record either a transcript of the communication or a memorandum setting forth the contents of the communication and the circumstances thereof; such transcript or memorandum will not be part of the rulemaking record.

(iii) *Congressional communications.* The provisions of paragraph (c)(1)(ii) of this section do not apply to communications from members of Congress. Memoranda prepared by the Commissioner or Commissioner advisor setting forth the contents of any oral congressional communications will be placed

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on the public record. If the communication occurs within the initial comment period and is transcribed verbatim or summarized, the transcript or summary will be promptly placed on the rulemaking record. A transcript or summary of any oral communication which occurs after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer, who will determine whether such oral communication complies with the applicable requirements for written submissions at that stage of the proceeding. Transcripts or summaries of oral communications that comply with such requirements will be promptly placed on the rulemaking record. Transcripts or summaries of noncomplying oral communications will be placed promptly on the public record.

(2) *Communications by certain officers, employees, and agents of the Commission.* Any officer, employee, or agent of the Commission with investigative or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission is prohibited from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of *ex parte* matters as authorized by law.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46), 80 Stat. 383, as amended (5 U.S.C. 552))

[42 FR 43974, Sept. 1, 1977, as amended at 42 FR 60563, Nov. 28, 1977; 44 FR 16368, Mar. 19, 1979; 44 FR 21005, Apr. 9, 1979; 45 FR 78628, Nov. 26, 1980; 50 FR 53304, Dec. 31, 1985]

### § 1.19 Modification of a rule by the Commission at the time of judicial review.

In the event that a reviewing court determines under section 18(e)(2) of the Federal Trade Commission Act, to

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allow further submissions and presentations on the rule, the Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations. Such modified or new rule shall then be filed with the court together with an appropriate Statement of Basis and Purpose and the return of such submissions and presentations.

[40 FR 33966, Aug. 13, 1975, as amended at 50 FR 53304, Dec. 31, 1985]

### § 1.20 Alternative procedures.

If the Commission determines at the commencement of a rulemaking proceeding to employ procedures other than those established in the remainder of this subpart, it may do so by announcing those procedures in the FEDERAL REGISTER notice commencing the rulemaking proceeding.

[43 FR 35683, Aug. 11, 1978]

## Subpart C—Rules Promulgated Under Authority Other Than Section 18(a)(1)(B) of the FTC Act

AUTHORITY: 15 U.S.C. 46; 5 U.S.C. 552; Sec. 212(a), Pub. L. 104–121, 110 Stat. 857 (5 U.S.C. 601 note).

### § 1.21 Scope of the rules in this subpart.

This subpart sets forth procedures for the promulgation of rules under authority other than section 18(a)(1)(B) of the FTC Act except as otherwise required by law or otherwise specified in the rules of this chapter. This subpart does not apply to the promulgation of industry guides, general statements of policy, rules of agency organization, procedure, or practice, or rules governed by subpart B of this part.

[50 FR 53304, Dec. 31, 1985]

### § 1.22 Rulemaking.

(a) *Nature and authority.* For the purpose of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and regulations applicable to unlawful trade practices. Such rules and regulations express the experience and judgment of the Commission, based

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on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers.

(b) *Scope.* Rules may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular product or geographic markets, as may be appropriate.

(c) *Use of rules in adjudicative proceedings.* When a rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to the particular case.

[40 FR 15232, Apr. 4, 1975]

### § 1.23 Quantity limit rules.

Quantity limit rules are authorized by section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. These rules have the force and effect of law.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15232, Apr. 4, 1975]

### § 1.24 Rules applicable to wool, fur, and textile fiber products and rules promulgated under the Fair Packaging and Labeling Act.

Rules having the force and effect of law are authorized under section 6 of the Wool Products Labeling Act of 1939, section 8 of the Fur Products Labeling Act, section 7 of the Textile Fiber Products Identification Act, and sections 4, 5, and 6 of the Fair Packaging and Labeling Act.

[40 FR 15233, Apr. 4, 1975]

### § 1.25 Initiation of proceedings—petitions.

Proceedings for the issuance of rules or regulations, including proceedings for exemption of products or classes of products from statutory requirements, may be commenced by the Commission upon its own initiative or pursuant to petition filed with the Secretary by any interested person or group stating reasonable grounds therefor. Anyone

whose petition is not deemed by the Commission sufficient to warrant the holding of a rulemaking proceeding will be promptly notified of that determination and given an opportunity to submit additional data. Procedures for the amendment or repeal of a rule or regulation are the same as for the issuance thereof.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15232, Apr. 4, 1975]

### § 1.26 Procedure.

(a) *Investigations and conferences.* In connection with any rulemaking proceeding, the Commission at any time may conduct such investigations, make such studies, and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of subpart A of part 2 of this chapter.

(b) *Notice.* General notice of proposed rulemaking will be published in the FEDERAL REGISTER and, to the extent practicable, otherwise made available to interested persons except when the Commission for good cause finds that notice and public procedure relating to the rule are impractical, unnecessary or contrary to the public interest and incorporates such finding and a brief statement of the reasons therefor in the rule. If the rulemaking proceeding was instituted pursuant to petition, a copy of the notice will be served on the petitioner. Such notice will include:

(1) A statement of the time, place, and nature of the public proceedings;

(2) Reference to the authority under which the rule is proposed;

(3) Either the terms or substance of the proposed rule or description of the subjects and issues involved;

(4) An opportunity for interested persons to participate in the proceeding through the submission of written data, views, or arguments; and (5) A statement setting forth such procedures for treatment of communications from persons not employed by the Commission to Commissioners or Commissioner Advisors with respect to the merits of the proceeding as will incorporate the requirements of § 1.18(c), including the transcription of oral communications required by § 1.18(c)(2),

adapted in such form as may be appropriate to the circumstances of the particular proceeding.

(c) *Oral hearings.* Oral hearing on a proposed rule may be held within the discretion of the Commission, unless otherwise expressly required by law. Any such hearing will be conducted by the Commission, a member thereof, or a member of the Commission's staff. At the hearing interested persons may appear and express their views as to the proposed rule and may suggest such amendments, revisions, and additions thereto as they may consider desirable and appropriate. The presiding officer may impose reasonable limitations upon the length of time allotted to any person. If by reason of the limitations imposed the person cannot complete the presentation of his suggestions, he may within twenty-four (24) hours file a written statement covering those relevant matters which he did not orally present.

(d) *Promulgation of rules or orders.* The Commission, after consideration of all relevant matters of fact, law, policy, and discretion, including all relevant matters presented by interested persons in the proceeding, will adopt and publish in the FEDERAL REGISTER an appropriate rule or order, together with a concise general statement of its basis and purpose and any necessary findings, or will give other appropriate public notice of disposition of the proceeding. The FEDERAL REGISTER publication will contain the information required by the Paperwork Reduction Act, 44 U.S.C. 3501–3520, and the Regulatory Flexibility Act, 5 U.S.C. 601–612, if applicable. For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as “small entity compliance guides.”

(e) *Effective date of rules.* Except as provided in paragraphs (f) and (g) of this section, the effective date of any rule, or of the amendment, suspension, or repeal of any rule will be as specified in a notice published in the FEDERAL REGISTER, which date will be not less than thirty (30) days after the date of such publication unless an earlier ef-

fective date is specified by the Commission upon good cause found and published with the rule.

(f) *Effective date of rules and orders under Fair Packaging and Labeling Act.* The effective date of any rule or order under the Fair Packaging and Labeling Act will be as specified by order published in the FEDERAL REGISTER, but shall not be prior to the day following the last day on which objections may be filed under paragraph (g) of this section.

(g) *Objections and request for hearing under Fair Packaging and Labeling Act.* On or before the thirtieth (30th) day after the date of publication of an order in the FEDERAL REGISTER pursuant to paragraph (f) of this section, any person who will be adversely affected by the order if placed in effect may file objections thereto with the Secretary of the Commission, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Objections will be deemed sufficient to warrant the holding of a public hearing only:

(1) If they establish that the objector will be adversely affected by the order;

(2) If they specify with particularity the provisions of the order to which objection is taken; and

(3) If they are supported by reasonable grounds which, if valid and factually supported, may be adequate to justify the relief sought.

Anyone who files objections which are not deemed by the Commission sufficient to warrant the holding of a public hearing will be promptly notified of that determination. As soon as practicable after the time for filing objections has expired, the Commission will publish a notice in the FEDERAL REGISTER specifying those parts of the order which have been stayed by the filing of objections or, if no objections sufficient to warrant the holding of a hearing have been filed, stating that fact.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15232, Apr. 4, 1975, as amended at 44 FR 16368, Mar. 19, 1979; 50 FR 53304, Dec. 31, 1985; 63 FR 36340, July 6, 1998]

**Subpart D [Reserved]**

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### Subpart E—Export Trade Associations

#### § 1.41 Limited antitrust exemption.

The Export Trade Act authorizes the organization and operation of export trade associations, and extends to them certain limited exemptions from the Sherman Act and the Clayton Act. It also extends the jurisdiction of the Commission under the Federal Trade Commission Act to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

#### § 1.42 Notice to Commission.

To obtain the exemptions afforded by the Act, an export trade association is required to file with the Commission, within thirty (30) days after its creation, a verified written statement setting forth the location of its offices and places of business, names, and addresses of its officers, stockholders, or members, and copies of its documents of incorporation or association. On the first day of January of each year thereafter, each association must file a like statement and, when required by the Commission to do so, must furnish to the Commission detailed information as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals.

#### § 1.43 Recommendations.

Whenever the Commission has reason to believe that an association has violated the prohibitions of section 2 of the Act, it may conduct an investigation. If, after investigation, it concludes that the law has been violated, it may make to such association recommendations for the readjustment of its business. If the association fails to comply with the recommendations, the Commission will refer its findings and recommendations to the Attorney General for appropriate action.

### Subpart F—Trademark Cancellation Procedure

#### § 1.51 Applications.

Applications for the institution of proceedings for the cancellation of registration of trade, service, or certification marks under the Trade-Mark Act of 1946 may be filed with the Secretary of the Commission. Such applications shall be in writing, signed by or in behalf of the applicant, and should identify the registration concerned and contain a short and simple statement of the facts constituting the alleged basis for cancellation, the name and address of the applicant, together with all relevant and available information. If, after consideration of the application, or upon its own initiative, the Commission concludes that cancellation of the mark may be warranted, it will institute a proceeding before the Commissioner of Patents for cancellation of the registration.

### Subpart G—Injunctive and Condemnation Proceedings

#### § 1.61 Injunctions.

In those cases where the Commission has reason to believe that it would be to the interest of the public, the Commission will apply to the courts for injunctive relief, pursuant to the authority granted in section 13 of the Federal Trade Commission Act.

[40 FR 15233, Apr. 4, 1975]

#### § 1.62 Ancillary court orders pending review.

Where petition for review of an order to cease and desist has been filed in a U.S. court of appeals, the Commission may apply to the court for issuance of such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite.

#### § 1.63 Injunctions: Wool, fur, and textile cases.

In those cases arising under the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act, where it appears to the Commission that it would be to the public interest

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for it to do so, the Commission will apply to the courts for injunctive relief, pursuant to the authority granted in such Acts.

[32 FR 8444, June 13, 1967, as amended at 41 FR 4814, Feb. 2, 1976]

### § 1.64 Condemnation proceedings.

In those cases arising under the Wool Products Labeling Act of 1939 and Fur Products Labeling Act, and where it appears to the Commission that the public interest requires such action, the Commission will apply to the courts for condemnation, pursuant to the authority granted in such Acts.

[32 FR 8444, June 13, 1967, as amended at 41 FR 4814, Feb. 2, 1976]

## Subpart H—Administration of the Fair Credit Reporting Act

AUTHORITY: 84 Stat. 1128, 15 U.S.C. 1681 et seq.

### § 1.71 Administration.

The general administration of the Fair Credit Reporting Act (Title VI of the Consumer Credit Protection Act of 1968; enacted October 26, 1970; Pub. L. 91-508, 82 Stat. 146, 15 U.S.C. 1601 et seq.) is carried out by the Bureau of Consumer Protection, Division of Credit Practices. Any interested person may obtain copies of the Act and these procedures and rules of practice upon request to the Secretary of the Commission, Washington, DC 20580.

[36 FR 9293, May 22, 1971, as amended at 36 FR 18788, Sept. 22, 1971; 38 FR 32438, Nov. 26, 1973; 46 FR 26290, May 12, 1981]

### § 1.72 Examination, counseling and staff advice.

The Commission maintains a staff to carry out on-the-scene examination of records and procedures utilized to comply with the Fair Credit Reporting Act and to carry out industry counseling. Requests for staff interpretation of the Fair Credit Reporting Act should be directed to the Division of Credit Practices, Bureau of Consumer Protection. Such interpretations represent informal staff opinion which is advisory in nature and is not binding upon the Commission as to any action it may take in the matter. Administrative ac-

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tion to effect correction of minor infractions on a voluntary basis is taken in those cases where such procedure is believed adequate to effect immediate compliance and protect the public interest.

[36 FR 9293, May 22, 1971, as amended at 36 FR 18788, Sept. 22, 1971; 38 FR 32438, Nov. 26, 1973; 46 FR 26290, May 12, 1981]

### § 1.73 Interpretations.

(a) *Nature and purpose.* (1) The Commission issues and causes to be published in the FEDERAL REGISTER interpretations of the provisions of the Fair Credit Reporting Act on its own initiative or pursuant to the application of any person when it appears to the Commission that guidance as to the legal requirements of the Act would be in the public interest and would serve to bring about more widespread and equitable observance of the Act.

(2) The interpretations are not substantive rules and do not have the force or effect of statutory provisions. They are guidelines intended as clarification of the Fair Credit Reporting Act, and, like industry guides, are advisory in nature. They represent the Commission's view as to what a particular provision of the Fair Credit Reporting Act means for the guidance of the public in conducting its affairs in conformity with that Act, and they provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with such interpretations may result in corrective action by the Commission under applicable statutory provisions.

(b) *Procedure.* (1) Requests for Commission interpretations should be submitted in writing to the Secretary of the Federal Trade Commission stating the nature of the interpretation requested and the reasons and justification therefor. If the request is granted, as soon as practicable thereafter, the Commission will publish a notice in the FEDERAL REGISTER setting forth the text of the proposed interpretation. Comments, views, or objections, together with the grounds therefor, concerning the proposed interpretation may be submitted to the Secretary of the Commission within thirty (30) days of public notice thereof. The proposed

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interpretation will automatically become final after the expiration of sixty (60) days from the date of public notice thereof, unless upon consideration of written comments submitted as hereinabove provided, the Commission determine to rescind, revoke, modify, or withdraw the proposed interpretation, in which event notification of such determination will be published in the FEDERAL REGISTER.

(2) The issuance of such interpretations is within the discretion of the Commission and the Commission at any time may conduct such investigations and hold such conferences or hearings as it may deem appropriate. Any interpretation issued pursuant to this chapter is without prejudice to the right of the Commission to reconsider the interpretation, and where the public interest requires, to rescind, revoke, modify, or withdraw the interpretation, in which event notification of such action will be published in the FEDERAL REGISTER.

(c) *Applicability of interpretations.* Interpretations issued pursuant to this subpart may cover all applications of a particular statutory provision, or they may be limited in application to a particular industry, as appropriate.

[36 FR 9293, May 22, 1971]

### Subpart I—Procedures for Implementation of the National Environmental Policy Act of 1969

AUTHORITY: 15 U.S.C. 46(g), 42 U.S.C. 4321 et seq.

SOURCE: 47 FR 3096, Jan. 22, 1982, unless otherwise noted.

#### § 1.81 Authority and incorporation of CEQ Regulations.

This subpart is issued pursuant to 102(2) of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 et seq.). Pursuant to Executive Order 11514 (March 5, 1970, as amended by Executive Order 11991, May 24, 1977) and the Environmental Quality Improvement Act of 1980, as amended (42 U.S.C. 4371 et seq.) the Council on Environmental Quality (CEQ) has issued comprehensive regulations for implementing the procedural provi-

sions of NEPA (40 CFR parts 1500 through 1508) ("CEQ Regulations"). Although it is the Commission's position that these regulations are not binding on it, the Commission's policy is to comply fully with the CEQ Regulations unless it determines in a particular instance or for a category of actions that compliance would not be consistent with the requirements of law. With this caveat, the Commission incorporates into this subpart the CEQ Regulations. The following are supplementary definitions and procedures to be applied in conjunction with the CEQ Regulations.

[47 FR 3096, Jan. 22, 1982, as amended at 50 FR 53304, Dec. 31, 1985]

#### § 1.82 Declaration of policy.

(a) Except for actions which are not subject to the requirements of section 102(2)(C) of NEPA, no Commission proposal for a major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement has been prepared for consideration in the decisionmaking. All relevant environmental documents, comments, and responses as provided in this subpart shall accompany such proposal through all review processes. "Major actions, significantly affecting the quality of the human environment" referred to in this subpart "do not include bringing judicial or administrative civil or criminal enforcement actions" CEQ Regulation (40 CFR 1508.18(a)). In the event that the Commission in an administrative enforcement proceeding actively contemplates the adoption of standards or a form of relief which it determines may have a significant effect on the environment, the Commission will, when consistent with the requirements of law, provide for the preparation of an environmental assessment or an environmental impact statement or such other action as will permit the Commission to assess alternatives with a view toward avoiding or minimizing any adverse effect upon the environment.

(b) No Commission proposal for legislation significantly affecting the quality of the human environment and concerning a subject matter in which the Commission has primary responsibility will be submitted to Congress without

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an accompanying environmental impact statement.

(c) When the Commission finds that emergency action is necessary and an environmental impact statement cannot be prepared in conformance with the CEQ Regulations, the Commission will consult with CEQ about alternative arrangements in accordance with CEQ Regulation (40 CFR 1506.11).

### § 1.83 Whether to commence the process for an environmental impact statement.

(a) The Bureau responsible for submitting a proposed rule, guide, or proposal for legislation to the Commission for agency action shall, after consultation with the Office of the General Counsel, initially determine whether or not the proposal is one which requires an environmental impact statement. Except for matters where the environmental effects, if any, would appear to be either (1) clearly significant and therefore the decision is made to prepare an environmental impact statement, or (2) so uncertain that environmental analysis would be based on speculation, the Bureau should normally prepare an “environmental assessment” CEQ Regulation (40 CFR 1508.9) for purposes of providing sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. The Bureau should involve environmental agencies to the extent practicable in preparing an assessment. An environmental assessment shall be made available to the public when the proposed action is made public along with any ensuing environmental impact statement or finding of no significant impact.

(b) If the Bureau determines that the proposal is one which requires an environmental impact statement, it shall commence the “scoping process” CEQ Regulation (40 CFR 1501.7) except that the impact statement which is part of a proposal for legislation need not go through a scoping process but shall conform to CEQ Regulation (40 CFR 1506.8). As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process, the Bureau shall publish a notice of intent as provided in

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CEQ Regulations (40 CFR 1501.7 and 1508.22).

(c) If, on the basis of an environmental assessment, the determination is made not to prepare a statement, a finding of “no significant impact” shall be made in accordance with CEQ Regulation (40 CFR 1508.3) and shall be made available to the public as specified in CEQ Regulation (40 CFR 1506.6).

### § 1.84 Draft environmental impact statements: Availability and comment.

Except for proposals for legislation, environmental impact statements shall be prepared in two stages: Draft statement and final statement.

(a) *Proposed rules or guides.* (1) An environmental impact statement, if deemed necessary, shall be in draft form at the time a proposed rule or guide is published in the FEDERAL REGISTER and shall accompany the proposal throughout the decisionmaking process.

(2) The major decision points with respect to rules and guides are:

(i) Preliminary formulation of a staff proposal;

(ii) The time the proposal is initially published in the FEDERAL REGISTER as a Commission proposal;

(iii) Presiding officer’s report (in trade regulation rule proceedings);

(iv) Submission to the Commission of the staff report or recommendation for final action on the proposed guide or rule;

(v) Final decision by the Commission. The decision on whether or not to prepare an environmental impact statement should occur at point (a)(2)(i) of this section. The publication of any draft impact statement should occur at point (a)(2)(ii) of this section. The publication of the final environmental impact statement should occur at point (a)(2)(iv) of this section.

(b) *Legislative proposals.* In legislative matters, a legislative environmental impact statement shall be prepared in accordance with CEQ Regulation (40 CFR 1506.8).

(c) In rule or guide proceedings the draft environmental impact statement shall be prepared in accordance with CEQ Regulation (40 CFR 1502.9) and shall be placed in the public record to

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which it pertains; in legislative matters, the legislative impact statement shall be placed in a public record to be established, containing the legislative report to which it pertains; these will be available to the public through the Office of the Secretary and will be published in full with the appropriate proposed rule, guide, or legislative report; such statements shall also be filed with the Environmental Protection Agency's (EPA) Office of Environmental Review (CEQ Regulation (40 CFR 1506.9)) for listing in the weekly FEDERAL REGISTER Notice of draft environmental impact statements, and shall be circulated, in accordance with CEQ Regulations (40 CFR 1502.19, 1506.6) to appropriate federal, state and local agencies.

(d) Forty-five (45) days will be allowed for comment on the draft environmental impact statement, calculated from the date of publication in the EPA's weekly FEDERAL REGISTER list of draft environmental impact statements. The Commission may in its discretion grant such longer period as the complexity of the issues may warrant.

### § 1.85 Final environmental impact statements.

(a) After the close of the comment period, the Bureau responsible for the matter will consider the comments received on the draft environmental impact statement and will put the draft statement into final form in accordance with the requirements of CEQ Regulation (40 CFR 1502.9(b)), attaching the comments received (or summaries if response was exceptionally voluminous).

(b) Upon Bureau approval of the final environmental impact statement the final statement will be

- (1) Filed with the EPA;
- (2) Forwarded to all parties which commented on the draft environmental impact statement and to other interested parties, if practicable;
- (3) Placed in the public record of the proposed rule or guide proceeding or legislative matter to which it pertains;
- (4) Distributed in any other way which the Bureau in consultation with CEQ deems appropriate.

(c) In rule and guide proceedings, at least thirty (30) days will be allowed

for comment on the final environmental impact statement, calculated from the date of publication in the EPA's weekly FEDERAL REGISTER list of final environmental impact statements. In no event will a final rule or guide be promulgated prior to ninety (90) days after notice of the draft environmental impact statement, except where emergency action makes such time period impossible.

### § 1.86 Supplemental statements.

Except for proposals for legislation, as provided in CEQ Regulation (40 CFR 1502.9(c)), the Commission shall publish supplements to either draft or final environmental statements if:

(a) The Commission makes substantial changes in the proposed action that are relevant to environmental concerns; or

(b) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts. In the course of a trade regulation rule proceeding, the supplement will be placed in the rulemaking record.

### § 1.87 NEPA and agency decision-making.

In its final decision on the proposed action or, if appropriate, in its recommendation to Congress, the Commission shall consider all the alternatives in the environmental impact statement and other relevant environmental documents and shall prepare a concise statement which, in accordance with CEQ Regulation § 1505.2, shall:

(a) Identify all alternatives considered by the Commission in reaching its decision or recommendation, specifying the alternatives which were considered to be environmentally preferable;

(b) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.

### § 1.88 Implementing procedures.

(a) The General Counsel is designated the official responsible for coordinating the Commission's efforts to improve environmental quality. He will

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provide assistance to the staff in determining when an environmental impact statement is needed and in its preparation.

(b) The Commission will determine finally whether an action complies with NEPA.

(c) The Directors of the Bureaus of Consumer Protection and Competition will supplement these procedures for their Bureaus to assure that every proposed rule and guide is reviewed to assess the need for an environmental impact statement and that, where need exists, an environmental impact statement is developed to assure timely consideration of environmental factors.

(d) The General Counsel will establish procedures to assure that every legislative proposal on a matter for which the Commission has primary responsibility is reviewed to assess the need for an environmental impact statement and that, where need exists, and environmental impact statement is developed to assure timely consideration of environmental factors.

(e) Parties seeking information or status reports on environmental impact statements and other elements of the NEPA process, should contact the Assistant General Counsel for Litigation and Environmental Policy.

## § 1.89 Effect on prior actions.

It is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings which are already in progress.

## Subpart J—Economic Surveys, Investigations and Reports

### § 1.91 Authority and purpose.

General and special economic surveys, investigations, and reports are made by the Bureau of Economics under the authority of the various laws which the Federal Trade Commission administers. The Commission may in any such survey or investigation invoke any or all of the compulsory processes authorized by law.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15233, Apr. 4, 1975]

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## Subpart K—Penalties for Violation of Appliance Labeling Rules

SOURCE: 45 FR 67318, Oct. 10, 1980, unless otherwise noted.

### § 1.92 Scope.

The rules in this subpart apply to and govern proceedings for the assessment of civil penalties for the violation of section 332 of the Energy Policy and Conservation Act, 42 U.S.C. 6302, and the Commission's Rules on Labeling and Advertising of Consumer Appliances, 16 CFR part 305, promulgated under sections 324 and 326 of the Energy Policy and Conservation Act, 42 U.S.C. 6294 and 6296.

### § 1.93 Notice of proposed penalty.

(a) *Notice.* Before issuing an order assessing a civil penalty under this subpart against any person, the Commission shall provide to such person notice of the proposed penalty. This notice shall:

(1) Inform such person of the opportunity to elect in writing within 30 days of receipt of the notice of proposed penalty to have procedures of § 1.95 (in lieu of those of § 1.94) apply with respect to such assessment; and

(2) Include a copy of a proposed complaint conforming to the provision of § 3.11(b) (1) and (2) of the Commission's Rules of Practice, or a statement of the material facts constituting the alleged violation and the legal basis for the proposed penalty; and

(3) Include the amount of the proposed penalty; and

(4) Include a statement of the procedural rules that the Commission will follow if respondent elects to proceed under § 1.94 unless the Commission chooses to follow subparts B, C, D, E, and F of part 3 of this chapter.

(b) *Election.* Within 30 days of receipt of the notice of proposed penalty, the respondent shall, if it wishes to elect to have the procedures of § 1.95 apply, notify the Commission of the election in writing. The notification, to be filed in accordance with § 4.2 of this chapter, may include any factual or legal reasons for which the proposed assessment order should not issue, should be reduced in amount, or should otherwise be modified.

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### § 1.94 Commission proceeding to assess civil penalty.

If the respondent fails to elect to have the procedures of § 1.95 apply, the Commission shall determine whether to issue a complaint and thereby commence an adjudicative proceeding in conformance with section 333(d)(2)(A) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(d)(2)(A). If the Commission votes to issue a complaint, the proceeding shall be conducted in accordance with subparts B, C, D, E and F of part 3 of this chapter, unless otherwise ordered in the notice of proposed penalty. In assessing a penalty, the Commission shall take into account the factors listed in § 1.97.

### § 1.95 Procedures upon election.

(a) After receipt of the notification of election to apply the procedures of this section pursuant to § 1.93, the Commission shall promptly assess such penalty as it deems appropriate, in accordance with § 1.97.

(b) If the civil penalty has not been paid within 60 calendar days after the assessment order has been issued under paragraph (a) of this section, the General Counsel, unless otherwise directed, shall institute an action in the appropriate district court of the United States for an order enforcing the assessment of the civil penalty.

(c) Any election to have this section apply may not be revoked except with the consent of the Commission.

### § 1.96 Compromise of penalty.

The Commission may compromise any penalty or proposed penalty at any time, with leave of court when necessary, taking into account the nature and degree of violation and the impact of a penalty upon a particular respondent.

### § 1.97 Amount of penalty.

All penalties assessed under this subchapter shall be in the amount per violation as described in section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a), adjusted for inflation pursuant to § 1.98, unless the Commission otherwise directs. In considering the amount of penalty, the Commission shall take into account:

- (a) Respondent's size and ability to pay;
- (b) Respondent's good faith;
- (c) Any history of previous violations;
- (d) The deterrent effect of the penalty action;
- (e) The length of time involved before the Commission was made aware of the violation;
- (f) The gravity of the violation, including the amount of harm to consumers and the public caused by the violation; and
- (g) Such other matters as justice may require.

[32 FR 8444, June 13, 1967, as amended at 61 FR 54548, Oct. 21, 1996]

### Subpart L—Civil Penalty Adjustments Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as Amended by the Debt Collection Improvement Act of 1996

AUTHORITY: 28 U.S.C. 2461 note.

SOURCE: 61 FR 54549, Oct. 21, 1996, unless otherwise noted.

### § 1.98 Adjustment of civil monetary penalty amounts.

This section makes inflation adjustments in the dollar amounts of civil monetary penalties provided by law within the Commission's jurisdiction. The following civil penalty amounts apply to violations occurring after February 9, 2009.

- (a) Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1)—\$16,000;
- (b) Section 11(1) of the Clayton Act, 15 U.S.C. 21(1)—\$7,500;
- (c) Section 5(1) of the FTC Act, 15 U.S.C. 45(1)—\$16,000;
- (d) Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A)—\$16,000;
- (e) Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)—\$16,000;
- (f) Section 10 of the FTC Act, 15 U.S.C. 50—\$110;
- (g) Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65—\$110;
- (h) Section 6(b) of the Wool Products Labeling Act, 15 U.S.C. 68d(b)—\$110;
- (i) Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e)—\$110;

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(j) Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2)—\$110;

(k) Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a)—\$110;

(l) Sections 525(a) and (b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) and (b), respectively—\$7,500 and \$16,000, respectively;

(m) Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2)—\$3,500; and

(n) Civil monetary penalties authorized by reference to the Federal Trade Commission Act under any other provision of law within the jurisdiction of the Commission—refer to the amounts set forth in paragraphs (c), (d), (e) and (f) of this section, as applicable.

[65 FR 69666, Nov. 20, 2000, as amended at 69 FR 76612, Dec. 22, 2004; 74 FR 858, Jan. 9, 2009]

## Subpart M—Submissions Under the Small Business Regulatory Enforcement Fairness Act

AUTHORITY: 5 U.S.C. 801–804.

### § 1.99 Submission of rules, guides, interpretations, and policy statements to Congress and the Comptroller General.

Whenever the Commission issues or substantively amends a rule or industry guide or formally adopts an interpretation or policy statement that constitutes a “rule” within the meaning of 5 U.S.C. 804(3), a copy of the final rule, guide, interpretation or statement, together with a concise description, the proposed effective date, and a statement of whether the rule, guide, interpretation or statement is a “major rule” within the meaning of 5 U.S.C. 804(2), will be transmitted to each House of Congress and to the Comptroller General. The material transmitted to the Comptroller General will also include any additional relevant information required by 5 U.S.C. 801(a)(1)(B). This provision generally applies to rules issued or substantively amended pursuant to § 1.14(c), § 1.15(a), § 1.19, or § 1.26(d); industry guides issued pursuant to § 1.6; interpretations and policy statements formally adopted by the Commission; and any rule of agency organization, practice or procedure

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that substantially affects the rights or obligations of non-agency parties.

[63 FR 36340, July 8, 1998]

## Subpart N—Administrative Wage Garnishment

### § 1.100 Administrative wage garnishment.

(a) *General.* The Commission may use administrative wage garnishment for debts, including those referred to Financial Management Service, Department of Treasury, for cross-servicing. Regulations in 31 CFR 285.11 govern the collection of delinquent nontax debts owed to federal agencies through administrative garnishment of non-Federal wages. Whenever the Financial Management Service collects such a debt for the Commission using administrative wage garnishment, the statutory administrative requirements in 31 CFR 285.11 will govern.

(b) *Hearing official.* Any hearing required to establish the Commission’s right to collect a debt through administrative wage garnishment shall be conducted by a qualified individual selected at the discretion of the Chairman of the Commission, as specified in 31 CFR 285.11.

[75 FR 68418, Nov. 8, 2010]

## PART 2—NONADJUDICATIVE PROCEDURES

### Subpart A—Inquiries; Investigations; Compulsory Processes

Sec.

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- 2.2 Request for Commission action.
- 2.3 Policy as to private controversies.
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- 2.16 Custodians.
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### **Subpart B—Petitions Filed Under Section 7A of the Clayton Act, as Amended, for Review of Requests for Additional Information or Documentary Material**

- 2.20 Petitions for review of requests for additional information or documentary material.

### **Subpart C—Consent Order Procedure**

- 2.31 Opportunity to submit a proposed consent order.
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### **Subpart D—Reports of Compliance**

- 2.41 General compliance obligations and specific obligations regarding acquisitions and divestitures.

### **Subpart E—Requests To Reopen**

- 2.51 Requests to reopen.

AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

## **Subpart A—Inquiries; Investigations; Compulsory Processes**

### **§ 2.1 How initiated.**

Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection and, the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelegation, limited authority to initiate investigations. The Director of the Bureau of Competition has also been delegated, without power of redelegation, authority to open investigations in response to requests pursuant to an agreement under the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201 et seq., if the

requests do not ask the Commission to use process. Before responding to such a request, the Bureau Director shall transmit the proposed response to the Secretary and the Secretary shall notify the Commission of the proposed response. If no Commissioner objects within three days following the Commission's receipt of such notification, the Secretary shall inform the Bureau Director that he or she may proceed.

[48 FR 41374, Sept. 15, 1983, as amended at 50 FR 53304, Dec. 31, 1985; 65 FR 67259, Nov. 9, 2000]

### **§ 2.2 Request for Commission action.**

(a) Any individual, partnership, corporation, association, or organization may request the Commission to institute an investigation in respect to any matter over which the Commission has jurisdiction.

(b) Such request should be in the form of a signed statement setting forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of. No forms or formal procedures are required.

(c) The person making the request is not regarded as a party to any proceeding which might result from the investigation.

(d) It is the general Commission policy not to publish or divulge the name of an applicant or complaining party except as required by law or by the Commission's rules. Where a complaint is by a consumer or consumer representative concerning a specific consumer product or service, the Commission, in the course of a referral of the complaint or of an investigation, may disclose the identity of the complainant or complainants. In referring any such consumer complaint, the Commission specifically retains its right to take such action as it deems appropriate in the public interest and under any of the statutes which it administers.

[32 FR 8446, June 13, 1967, as amended at 35 FR 10146, June 20, 1970]

### **§ 2.3 Policy as to private controversies.**

The Commission acts only in the public interest and does not initiate an

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investigation or take other action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public.

[32 FR 8446, June 13, 1967]

### § 2.4 Investigational policy.

The Commission encourages voluntary cooperation in its investigations. Where the public interest requires, however, the Commission may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law.

[45 FR 36341, May 29, 1980]

### § 2.5 By whom conducted.

Inquiries and investigations are conducted under the various statutes administered by the Commission by Commission representatives designated and duly authorized for the purpose. Such representatives are “examiners” or “Commission investigators” within the meaning of the Federal Trade Commission Act and are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Included among such duties is the administration of oaths and affirmations in any matter under investigation by the Commission.

[45 FR 36341, May 29, 1980]

### § 2.6 Notification of purpose.

Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation.

[46 FR 26290, May 12, 1981; 46 FR 27634, May 21, 1981]

### § 2.7 Compulsory process in investigations.

(a) *In general.* The Commission or any member thereof may, pursuant to a Commission resolution, issue a subpoena or a civil investigative demand directing the person named therein to

appear before a designated representative at a designated time and place to testify or to produce documentary evidence, or both, or, in the case of a civil investigative demand, to provide a written report or answers to questions relating to any matter under investigation by the Commission. Material for which a civil investigative demand has been issued shall be made available for inspection and copying at the principal place of business of the person or at such other place or in such other manner as the person and the custodian designated pursuant to § 2.16 agree.

(b) *Civil investigative demands.* Civil investigative demands shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices within the meaning of FTC Act section 5(a)(1).

(1) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Production of documentary material in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(2) Civil investigative demands for tangible things will describe each class of tangible things to be produced with such definiteness and certainty as to permit such things to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the custodian to whom such things shall be submitted. Submission of tangible things in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(3) Civil investigative demands for written reports or answers to questions

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shall propound with definiteness and certainty the reports to be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted. Response to a civil investigative demand for a written report or answers to questions shall be made in accordance with the procedures prescribed by section 20(c)(13) of the Federal Trade Commission Act.

(4) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures prescribed by section 20(c)(14) of the Federal Trade Commission Act.

(c) The Bureau Director, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors, and Assistant Regional Directors, are authorized to negotiate and approve the terms of satisfactory compliance with subpoenas and civil investigative demands and, for good cause shown, may extend the time prescribed for compliance. Specifically, the subpoena power conferred by Section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) is included within this delegation.

(d) *Petitions to limit or quash*—(1) *General*. Any petition to limit or quash any investigational subpoena or civil investigative demand shall be filed with the Secretary of the Commission within twenty (20) days after service of the subpoena or civil investigative demand, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation.

(2) *Statement*. Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

(3) *Extensions of time*. Bureau Directors, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors in the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file such petitions.

(4) *Disposition*. A Commissioner, to be designated by the Chairman, is delegated, without power of redelegation, the authority to rule upon petitions to limit or quash an investigational subpoena or civil investigative demand, but the designated Commissioner may, in his or her sole discretion, refer a petition to the full Commission for determination.

(e) *Stay of compliance period*. The timely filing of a petition to limit or quash any investigational subpoena or civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the petition is denied in whole or in part, the ruling will specify a new return date.

(f) *Review*. Any petitioner, within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition, may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date specified in the ruling, unless otherwise specified by the Commission.

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(g) *Public disclosure.* All petitions to limit or quash investigational subpoenas or civil investigative demands and the responses thereto are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

[45 FR 36342, May 29, 1980, as amended at 46 FR 26290, May 12, 1981; 48 FR 41375, Sept. 15, 1983; 49 FR 6089, Feb. 17, 1984; 50 FR 42672, Oct. 22, 1985; 60 FR 37747, July 21, 1995]

### § 2.8 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission, including rulemaking proceedings under subpart B of part 1 of this chapter, inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust laws are being carried out, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Export Trade Act.

(b) Investigational hearings shall be conducted by any Commission member, examiner, attorney, investigator, or other person duly designated under the FTC Act, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

(c) Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. A copy of the transcript shall promptly be forwarded by

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the Commission investigator to the custodian designated in § 2.16.

[32 FR 8446, June 13, 1967, as amended at 45 FR 36342, May 29, 1980; 61 FR 50645, Sept. 26, 1996]

### § 2.8A Withholding requested material.

(a) Any person withholding material responsive to an investigational subpoena or civil investigative demand issued pursuant to § 2.7, an access order issued pursuant to § 2.11, an order to file a report issued pursuant to § 2.12, or any other request for production of material issued under this part, shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena, civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material solely for reasons described in § 2.8A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5, 38 Stat. 719 as amended (15 U.S.C. 45))

[44 FR 54042, Sept. 18, 1979, as amended at 45 FR 36342, May 29, 1980]

### § 2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony. Where the investigational hearing has

been conducted pursuant to a civil investigative demand issued under section 20 of the Federal Trade Commission Act, upon completion of transcription of the testimony of the witness, the witness shall be offered an opportunity to read the transcript of his testimony. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness unless the witness cannot be found, is ill, waives in writing his right to signature or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to review it, the Commission investigator shall take the actions prescribed by section 20(c)(12)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in an investigational hearing may be accompanied, represented, and advised by counsel as follows:

(1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness. If the witness refuses to answer a question, then counsel may briefly state on the record if he has advised the witness not to answer the question and the legal grounds for such refusal.

(2) Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

(3) Any objections made under the rules in this part will be treated as continuing objections and preserved throughout the further course of the hearing without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are un-

necessary. Repetition of the grounds for any objection will not be allowed.

(4) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b) (1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena or civil investigative demand must have been addressed to the Commission in advance of the hearing. Copies of such petitions may be filed as part of the record of the investigation with the person conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.

(5) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the investigational hearing to permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the hearing.

(6) The person conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Commission, acting pursuant to §4.1(e) of this chapter, will thereupon take such further action, if any, as the circumstances warrant, including suspension or disbarment of the attorney from further practice before the Commission or exclusion from further participation in the particular investigation.

(18 U.S.C. 6002, 6004)

[32 FR 8446, June 13, 1967, as amended at 45 FR 36343, May 29, 1980; 45 FR 39244, June 10, 1980; 46 FR 26290, May 12, 1981; 50 FR 53304, Dec. 31, 1985; 61 FR 50645, Sept. 26, 1996]

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### § 2.10 Depositions.

In investigations other than those conducted under section 20 of the Federal Trade Commission Act, the Commission may order testimony to be taken by deposition at any stage of such investigation. Such depositions may be taken before any person having power to administer oaths who may be designated by the Commission. The testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed to by the deponent. Any person may be compelled to appear and be deposed and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence as provided in §§ 2.7 through 2.9.

[45 FR 36343, May 29, 1980, as amended at 50 FR 53304, Dec. 31, 1985]

### § 2.11 Orders requiring access.

(a) In investigations other than those conducted under section 20 of the Federal Trade Commission Act, the Commission may issue an order requiring any person, partnership or corporation being investigated to grant access to files for the purpose of examination and the right to copy any documentary evidence. The Directors, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring access issued during the investigation of any matter.

(b) Any petition to limit or quash an order requiring access shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the order re-

quiring access, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring access shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring access.

(c) The timely filing of any petition to limit or quash such an order shall stay the requirement of compliance if the Commission has not ruled upon the motion by the date of compliance. If it rules on or subsequent to the date required for compliance and its ruling denies the petition in whole or in part, the Commission shall specify a new date of compliance.

(d) All petitions to limit or quash orders requiring access, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

[46 FR 26290, May 12, 1981, as amended at 48 FR 41375, Sept. 15, 1983]

### § 2.12 Reports.

(a) In investigations other than those covered by section 20 of the Federal Trade Commission Act the Commission may issue an order requiring a person, partnership, or corporation to file a report or answers in writing to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(b) The Directors, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, and the Regional Directors and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring reports or answers to questions issued

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during the investigation, study or survey of any matter or in connection with any of the Commission's reporting programs.

(c) Any petition to limit or quash an order requiring a report or answer to specific questions shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the order requiring a report or answer to specific questions, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring reports or answers to questions shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring reports or answers to questions.

(d) Except as otherwise provided by the Commission, the timely filing of any petition to limit or quash such an order shall stay the requirement of return on the portion challenged if the Commission has not ruled upon the petition by the return date. If it rules on or subsequent to the return date and its ruling denies the petition in whole or in part, the Commission shall specify a new return date.

(e) All petitions to limit or quash orders requiring a report or answers to specific questions, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

[41 FR 54485, Dec. 14, 1976, as amended at 45 FR 36343, May 29, 1980; 46 FR 26290, May 12, 1981; 48 FR 41375, Sept. 15, 1983; 50 FR 53304, Dec. 31, 1985]

### § 2.13 Noncompliance with compulsory processes.

(a) In cases of failure to comply with Commission compulsory processes, ap-

propriate action may be initiated by the Commission or the Attorney General, including actions for enforcement, forfeiture, or penalties or criminal actions.

(b) The General Counsel, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized:

(1) To institute, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a person, partnership, or corporation to comply with, or to obey, a subpoena, or civil investigative demand if the return date or any extension thereof has passed;

(2) To approve and have prepared and issued, in the name of the Commission when deemed appropriate by the General Counsel, a notice of default in connection with the failure of a person, partnership, or corporation to timely file a report pursuant to section 6(b) of the Federal Trade Commission Act, if the return date or any extension thereof has passed;

(3) To institute, on behalf of the Commission, an enforcement proceeding and to request, on behalf of the Commission, the institution, when deemed appropriate by the General Counsel, of a civil action in connection with the failure of a person, partnership, or corporation to timely file a report pursuant to an order under section 6(b) of the Federal Trade Commission Act, if the return date or any extension thereof has passed; and

(4) To seek civil contempt in cases where a court order enforcing compulsory process has been violated.

[41 FR 54485, Dec. 14, 1976, as amended at 45 FR 39244, June 10, 1980; 50 FR 53304, Dec. 31, 1985]

### § 2.14 Disposition.

(a) When the facts disclosed by an investigation indicate that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to subpart C of this part, further proceedings may be instituted pursuant to the provisions of part 3 of this chapter.

(b) When the facts disclosed by an investigation indicate that corrective action is not necessary or warranted in the public interest, the investigational

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file will be closed. The matter may be further investigated at any time if circumstances so warrant.

(c) The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, and Regional Directors, without power of re-delegation, limited authority to close investigations.

[32 FR 8446, June 13, 1967, as amended at 42 FR 42195, Aug. 22, 1977; 48 FR 41375, Sept. 15, 1983; 50 FR 53304, Dec. 31, 1985]

### **§ 2.15 Orders requiring witnesses to testify or provide other information and granting immunity.**

(a) The Bureau Director, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are hereby authorized to request, through the Commission's liaison officer, approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information granting immunity under title 18, section 6002, of the United States Code.

(b) The Commission retains the right to review the exercise of any of the functions delegated under paragraph (a) of this section. Appeals to the Commission from an order requiring a witness to testify or provide other information will be entertained by the Commission only upon a showing that a substantial question is involved, the determination of which is essential to serve the interests of justice. Such appeals shall be made on the record and shall be in the form of a brief not to exceed fifteen (15) pages in length and shall be filed within five (5) days after notice of the complained of action. The appeal shall not operate to suspend the hearing unless otherwise determined by the person conducting the hearing or ordered by the Commission.

(18 U.S.C. 6002, 6004)

[37 FR 5016, Mar. 9, 1972, as amended at 48 FR 41375, Sept. 15, 1983; 61 FR 50645, Sept. 26, 1996]

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### **§ 2.16 Custodians.**

(a) *Designation.* The Commission shall designate a custodian and one or more deputy custodians for material to be delivered pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. The custodian shall have the powers and duties prescribed by section 21 of the FTC Act. Deputy custodians may perform all of the duties assigned to custodians. The appropriate Bureau Directors, Deputy Directors, Associate Directors in the Bureau of Consumer Protection, Assistant Directors in the Bureau of Competition, Regional Directors or Assistant Regional Directors shall take the action required by section 21(b)(7) of the FTC Act if it is necessary to replace a custodian or deputy custodian.

(b) *Copying of custodial documents.* The custodian designated pursuant to section 21 of the Federal Trade Commission Act (subject to the general supervision of the Executive Director) may, from among the material submitted, select the material the copying of which is necessary or appropriate for the official use of the Commission, and shall determine, the number of copies of any such material that are to be reproduced. Copies of material in the physical possession of the custodian may be reproduced by or under the authority of an employee of the Commission designated by the custodian.

(c) Material produced pursuant to the Federal Trade Commission Act, while in the custody of the custodian, shall be for the official use of the Commission in accordance with the Act; but such material shall upon reasonable notice to the custodian be made available for examination by the person who produced such material, or his duly authorized representative, during regular office hours established for the Commission.

[45 FR 36343, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 48 FR 41376, Sept. 15, 1983; 50 FR 53305, Dec. 31, 1985]

### **§ 2.17 Statutory delays of notifications and prohibitions of disclosure.**

Upon authorization by the Commissioner who issues compulsory process

pursuant to §2.7(a) or, alternatively, upon authorization by the General Counsel, Commission attorneys may seek to delay notifications or prohibit disclosures pursuant to the Right to Financial Privacy Act (12 U.S.C. 3409), the Electronic Communications Privacy Act (18 U.S.C. 2705), or section 7 of the U.S. SAFE WEB Act (15 U.S.C. 57b-2a).

[76 FR 54691, Sept. 2, 2011]

**Subpart B—Petitions Filed Under Section 7A of the Clayton Act, as Amended, for Review of Requests for Additional Information or Documentary Material**

AUTHORITY: 15 U.S.C. 18a(d), (e).

**§ 2.20 Petitions for review of requests for additional information or documentary material.**

(a) For purposes of this section, “second request” refers to a request for additional information or documentary material issued under 16 CFR 803.20.

(b) *Second request procedures*—(1) *Notice*. Every request for additional information or documentary material issued under 16 CFR 803.20 shall inform the recipient(s) of the request that the recipient has a right to discuss modifications or clarifications of the request with an authorized representative of the Commission. The request shall identify the name and telephone number of at least one such representative.

(2) *Second request conference*. An authorized representative of the Commission shall invite the recipient to discuss the request for additional information or documentary material soon after the request is issued. At the conference, the authorized representative shall discuss the competitive issues raised by the proposed transaction, to the extent then known, and confer with the recipient about the most effective way to obtain information and documents relating to the competitive issues raised. The conference will ordinarily take place within 5 business days of issuance of the request, unless the recipient declines the invitation or requests a later date.

(3) *Modification of requests*. The authorized representative shall modify the request for additional information or documentary material, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if he or she determines that a less burdensome request would be consistent with the needs of the investigation. A request for additional information or documentary material may be modified only in writing signed by the authorized representative.

(4) *Review of request decisions*. (i) If the recipient of a request for additional information or documentary material believes that compliance with portions of the request should not be required and the recipient has exhausted reasonable efforts to obtain clarifications or modifications of the request from an authorized representative, the recipient may petition the General Counsel to consider and rule on unresolved issues. Such petition shall be submitted by letter to the General Counsel with a copy to the authorized representative who participated in the second request conference held under paragraph (b)(3) of this section. The petition shall not, without leave of the General Counsel, exceed 500 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and any appendices containing only sections of statutes or regulations, and shall address petitioner’s efforts to obtain modification from the authorized representative.

(ii) Within 2 business days after receiving such a petition, the General Counsel shall set a date for a conference with the petitioner and the authorized representative.

(iii) Such conference shall take place within 7 business days after the General Counsel receives the petition, unless the request recipient agrees to a later date or declines to attend a conference.

(iv) Not later than 3 business days before the date of the conference, the petitioner and the authorized representative may each submit memoranda regarding the issues presented in the petition. Such memoranda shall not, without leave of the General Counsel, exceed 1250 words, excluding any cover,

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table of contents, table of authorities, glossaries, proposed form of relief and appendices containing only sections of statutes or regulations. Such memoranda shall be delivered to counsel for the other participants on the same day they are delivered to the General Counsel.

(v) The petitioner's memorandum shall include a concise statement of reasons why the request should be modified, together with proposed modifications, or a concise explanation why the recipient believes it has substantially complied with the request for additional information or documentary material.

(vi) The authorized representative's memorandum shall include a concise statement of reasons why the petitioner's proposed modifications are inappropriate or a concise statement of the reasons why the representative believes that the petitioner has not substantially complied with the request for additional information and documentary material.

(vii) The General Counsel shall advise the petitioner and the authorized representative of his or her decision within 3 business days following the conference.

[66 FR 8721, Feb. 1, 2001]

### **Subpart C—Consent Order Procedure**

#### **§ 2.31 Opportunity to submit a proposed consent order.**

(a) Where time, the nature of the proceeding, and the public interest permit, any individual, partnership, or corporation being investigated shall be afforded the opportunity to submit through the operating Bureau or Regional Office having responsibility in the matter a proposal for disposition of the matter in the form of a consent order agreement executed by the party being investigated and complying with the requirements of § 2.32, for consideration by the Commission in connection with a proposed complaint submitted by the Commission's staff.

(b) After a complaint has been issued, the consent order procedure described

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in this part will not be available except as provided in § 3.25(b).

[40 FR 15235, Apr. 4, 1975]

#### **§ 2.32 Agreement.**

Every agreement in settlement of a Commission complaint shall contain, in addition to an appropriate proposed order, either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission's staff or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. Every agreement also shall waive further procedural steps and all rights to seek judicial review or otherwise to challenge or contest the validity of the order. In addition, where appropriate, every agreement in settlement of a Commission complaint challenging the lawfulness of a proposed merger or acquisition shall also contain a hold-separate or asset-maintenance order. The agreement may state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint. Every agreement shall provide that:

(a) The complaint may be used in construing the terms of the order;

(b) No agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order;

(c) The order will have the same force and effect and may be altered, modified or set aside in the same manner provided by statute for Commission orders issued on a litigated or stipulated record;

(d) Except as provided by order of the Commission, any order issued pursuant to the agreement will become final upon service;

(e) The agreement will not become a part of the public record unless and until it is accepted by the Commission; and

(f) If the Commission accepts the agreement, further proceedings will be governed by § 2.34.

[64 FR 46268, Aug. 25, 1999]

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### § 2.33 Compliance procedure.

The Commission may in its discretion require that a proposed agreement containing an order to cease and desist be accompanied by an initial report signed by the respondent setting forth in precise detail the manner in which the respondent will comply with the order when and if entered. Such report will not become part of the public record unless and until the accompanying agreement and order are accepted by the Commission. At the time any such report is submitted a respondent may request confidentiality for any portion thereof with a precise showing of justification therefor as set out in § 4.9(c) and the General Counsel or the General Counsel's designee will dispose of such requests in accordance with that section.

[63 FR 32977, June 17, 1998]

### § 2.34 Disposition.

(a) *Acceptance of proposed consent agreement.* The Commission may accept or refuse to accept a proposed consent agreement. Except as otherwise provided in paragraph (c) of this section, acceptance does not constitute final approval, but it serves as the basis for further actions leading to final disposition of the matter.

(b) *Effectiveness of hold-separate or asset-maintenance order.* Following acceptance of a consent agreement, the Commission will, if it deems a hold-separate or asset-maintenance order appropriate, issue a complaint and such an order as agreed to by the parties. Such order will be final upon service. The issuance of a complaint under this paragraph will neither commence an adjudicatory proceeding subject to part 3 of this chapter nor subject the consent agreement proceeding to the prohibitions specified in § 4.7 of this chapter.

(c) *Public comment.* Promptly after its acceptance of the consent agreement, the Commission will place the order contained in the consent agreement, the complaint, and the consent agreement on the public record for a period of 30 days, or such other period as the Commission may specify, for the receipt of comments or views from any

interested person. At the same time, the Commission will place on the public record an explanation of the provisions of the order and the relief to be obtained thereby and any other information that it believes may help interested persons understand the order. The Commission also will publish the explanation in the FEDERAL REGISTER. The Commission retains the discretion to issue a complaint and a Final Decision and Order, incorporating the order contained in a consent agreement, in appropriate cases before seeking public comment. Unless directed otherwise by the Commission, such Decision and Order will be final upon service.

(d) *Comment on initial compliance report.* If respondents have filed an initial report of compliance pursuant to § 2.33, the Commission will place that report on the public record, except for portions, if any, granted confidential treatment pursuant to § 4.9(c) of this chapter, with the complaint, the order, and the consent agreement.

(e) *Action following comment period.* (1) Following the comment period, on the basis of comments received or otherwise, the Commission may either withdraw its acceptance of the agreement and so notify respondents, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint in such form as the circumstances may require and its decision in disposition of the proceeding.

(2) The Commission, following the comment period, may determine, on the basis of the comments or otherwise, that a Final Decision and Order that was issued in advance of the comment period should be modified. Absent agreement by respondents to the modifications, the Commission may initiate a proceeding to reopen and modify the decision and order in accordance with § 3.72(b) of this chapter or commence a new administrative proceeding by issuing a complaint in accordance with § 3.11 of this chapter.

[64 FR 46269, Aug. 25, 1999]

### Subpart D—Reports of Compliance

#### § 2.41 General compliance obligations and specific obligations regarding acquisitions and divestitures.

(a) In every proceeding in which the Commission has issued an order pursuant to the provisions of section 5 of the Federal Trade Commission Act or section 11 of the Clayton Act, as amended, and except as otherwise specifically provided in any such order, each respondent named in such order shall file with the Commission, within sixty (60) days after service thereof, or within such other time as may be provided by the order or the rules in this chapter, a report in writing, signed by the respondent, setting forth in detail the manner and form of his compliance with the order, and shall thereafter file with the Commission such further signed, written reports of compliance as it may require. An original and one copy of each such report shall be filed with the Secretary of the Commission, and one copy of each such report shall be filed with the Associate Director for Enforcement in the Bureau of Consumer Protection (for consumer protection orders) or with the Assistant Director for Compliance in the Bureau of Competition (for competition orders). Reports of compliance shall be under oath if so requested. Where the order prohibits the use of a false advertisement of a food, drug, device, or cosmetic which may be injurious to health because of results from its use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, or in any other case where the circumstances so warrant, the order may provide for an interim report stating whether and how respondents intend to comply to be filed within ten (10) days after service of the order. Neither the filing of an application for stay pursuant to § 3.56, nor the filing of a petition for judicial review, shall operate to postpone the time for filing a compliance report under the order or this section. If the Commission, or a court, determines to grant a stay of an order, or portion thereof, pending judicial review, or if

any order provision is automatically stayed by statute, no compliance report shall be due as to those portions of the order that are stayed unless ordered by the court. Thereafter, as to orders, or portions thereof, that are stayed, the time for filing a report of compliance shall begin to run de novo from the final judicial determination, except that if no petition for certiorari has been filed following affirmance of the order of the Commission by a court of appeals, the compliance report shall be due the day following the date on which the time expires for the filing of such petition. Staff of the Bureaus of Competition and Consumer Protection will review such reports of compliance and may advise each respondent whether the staff intends to recommend that the Commission take any enforcement action. The Commission may, however, institute proceedings, including certification of facts to the Attorney General pursuant to the provisions of section 5(l) of the Federal Trade Commission Act (15 U.S.C. 45(l)) and section 11(1) of the Clayton Act, as amended (15 U.S.C. 21(1)), to enforce compliance with an order, without advising a respondent whether the actions set forth in a report of compliance evidence compliance with the Commission's order or without prior notice of any kind to a respondent.

(b) The Commission has delegated to the Director, the Deputy Directors, and the Assistant Director for Compliance of the Bureau of Competition, and to the Director, the Deputy Directors, and the Associate Director for Enforcement of the Bureau of Consumer Protection the authority to monitor compliance reports and to open and close compliance investigations. With respect to any compliance matter which has received previous Commission consideration as to compliance or in which the Commission or any Commissioner has expressed an interest, any matter proposed to be closed by reason of expense of investigation or testing, or any matter involving substantial questions as to the public interest, Commission policy or statutory construction, the Bureaus shall submit an analysis to the Commission regarding their intended actions.

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(c) The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition and to the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection, and to the Regional Directors, the authority, for good cause shown, to extend the time within which reports of compliance with orders to cease and desist may be filed. It is to be noted, however, that an extension of time within which a report of compliance may be filed, or the filing of a report which does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to compliance with such order. An order of the Commission to cease and desist becomes final on the date and under the conditions provided in the Federal Trade Commission Act and the Clayton Act. Any person, partnership or corporation against which an order to cease and desist has been issued who is not in full compliance with such order on and after the date provided in these statutes for the order to become final is in violation of such order and is subject to an immediate action for civil penalties. The authority under this paragraph may not be redelegated, except that the Associate Director for Enforcement in the Bureau of Consumer Protection and the Assistant Director for Compliance in the Bureau of Competition may each name a designee under this paragraph.

(d) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order. A request ordinarily will be considered inappropriate for such advice:

(1) Where the course of action is already being followed by the requesting party;

(2) Where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or

(3) Where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing or collateral inquiry.

Furthermore, the filing of a request for advice under this paragraph does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to his compliance with the order. He must in any event be in full compliance on and after the date the order becomes final as prescribed by statute referred to in paragraph (b) of this section. Advice to respondents under this paragraph will be published by the Commission in the same manner and subject to the same restrictions and considerations as advisory opinions under § 1.4 of this chapter.

(e) The Commission may at any time reconsider any advice given under this section and, where the public interest requires, rescind or revoke its prior advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's advice.

(f)(1) All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders (including modifications to previously approved transactions) shall

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fully describe the terms of the transaction or modification and shall set forth why the transaction or modification merits Commission approval. Such applications will be placed on the public record, together with any additional applicant submissions that the Commission directs be placed on the public record. The Director of the Bureau of Competition is delegated authority to direct such placement.

(2) The Commission will receive public comment on a prior approval application submitted pursuant to paragraphs (f)(1) or (5) of this section for thirty (30) days. During the comment period, any person may file formal written objections or comments with the Secretary of the Commission, and such objections or comments shall be placed on the public record. In appropriate cases, the Commission may shorten, eliminate, extend, or reopen a comment period.

(3) Responses to applications under this section, together with a statement of supporting reasons, will be published when made, together with responses to any public comments filed under this section.

(4) Persons submitting information that is subject to public record disclosure under this section may request confidential treatment for that information or portions thereof in accordance with §4.9(c) and the General Counsel or the General Counsel's designee will dispose of such requests in accordance with that section. Nothing in this section requires that confidentiality requests be resolved prior to, or contemporaneously with, the disposition of the application.

(5)(i) Any application to modify either:

(A) An agreement that has been approved by the Commission pursuant to paragraph (f) of this section, or

(B) An agreement incorporated by reference into a final order of the Commission issued in connection with a merger, acquisition, or similar transaction shall be subject to review and approval in the manner described in paragraphs (f)(1) through (4) of this section, except as provided in paragraph (f)(5)(ii) of this section.

(ii) If the application establishes that the proposed modification is purely

ministerial, or unlikely under any plausible facts to affect achieving the remedial purposes of the order at issue, the Commission has delegated to the Director, Deputy Directors, and Assistant Director for Compliance of the Bureau of Competition, without power of redelegation, for good cause shown, the authority.

(A) To waive the approval requirement of paragraph (f)(5)(i) of this section; and

(B) To shorten, eliminate, extend or reopen the comment period pursuant to paragraph (f)(2) of this section.

(iii) Any agreement containing a modification approved, or for which the approval requirement is waived, pursuant to this paragraph (f)(5), shall be subject to any outstanding Commission order to the same extent as was the original agreement.

[32 FR 8449, June 13, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §2.41, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.fdsys.gov](http://www.fdsys.gov).

### Subpart E—Requests To Reopen

#### §2.51 Requests to reopen.

(a) *Scope.* Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final, may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered, modified, or set aside in whole or in part.

(b) *Contents.* A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part, or that the public interest so requires.

(1) This requirement shall not be deemed satisfied if a request is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail:

(i) The nature of the changed conditions and the reasons why they require

the requested modifications of the rule or order; or

(ii) The reasons why the public interest would be served by the modification.

(2) Each affidavit shall set forth facts that would be admissible in evidence and shall show that the affiant is competent to testify to the matters stated therein. All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.

(c) *Opportunity for public comment.* A request under this section shall be placed on the public record except for material exempt from public disclosure under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days after a press release on the request is issued. Bureau Directors are authorized to publish a notice in the FEDERAL REGISTER announcing the receipt of a request to reopen at their discretion. The public is invited to comment on the request while it is on the public record.

(d) *Determination.* After the period for public comments on a request under this section has expired and no later than one hundred and twenty (120) days after the date of the filing of the request, the Commission shall determine whether the request complies with paragraph (b) of this section and whether the proceeding shall be reopened and the rule or order should be altered, modified, or set aside as requested. In doing so, the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue an order to show cause pursuant to §3.72, or take such other action as is appropriate: *Provided, however,* That any action under §3.72 or otherwise shall be concluded within the specified 120-day period.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552))

[45 FR 36344, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 47 FR 33251, Aug. 2, 1982; 50 FR 53305, Dec. 31, 1985; 53 FR 40868, Oct. 19, 1988; 65 FR 50637, Aug. 21, 2000]

## PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

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AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

SOURCE: 32 FR 8449, June 13, 1967, unless otherwise noted.

### Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

#### § 3.1 Scope of the rules in this part; expedition of proceedings.

The rules in this part govern procedure in formal adjudicative proceedings. To the extent practicable and consistent with requirements of law, the Commission's policy is to conduct such proceedings expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay. In the event of a scheduling conflict between a proceeding in which the Commission also has sought or is seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and another proceeding, the proceeding in which the Commission also has sought or is seeking relief under Section 13(b) shall take precedence. The Commission, at any time, or the Administrative Law Judge at any time prior to the filing of his or her initial decision, may, with

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the consent of the parties, shorten any time limit prescribed by these Rules of Practice.

[74 FR 20208, May 1, 2009]

#### § 3.2 Nature of adjudicative proceedings.

Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5 and 6 of the Fair Packaging and Labeling Act, but does not include rulemaking proceedings up to the time when the Commission determines under § 1.26(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed. The term also includes proceedings for the assessment of civil penalties pursuant to § 1.94 of this chapter. The term does not include other proceedings such as negotiations for and Commission consideration of the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; requests for extensions of time to comply with final orders or other proceedings involving compliance with final orders; proceedings for the promulgation of industry guides or trade regulation rules; or the promulgation of substantive rules and regulations.

[74 FR 1820, Jan. 13, 2009]

#### Subpart B—Pleadings

##### § 3.11 Commencement of proceedings.

(a) *Complaint*. Except as provided in § 3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint*. The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

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(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the specific date, time and place for the evidentiary hearing. Unless a different date is determined by the Commission, the date of the evidentiary hearing shall be 5 months from the date of the administrative complaint in a proceeding in which the Commission, in an ancillary proceeding, has sought or is seeking relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and 8 months from the date of issuance of the administrative complaint in all other proceedings.

[74 FR 1820, Jan. 13, 2009]

### § 3.12 Answer.

(a) *Time for filing.* A respondent shall file an answer within 14 days after being served with the complaint.

(b) *Content of answer.* An answer shall conform to the following:

(1) *If allegations of complaint are contested.* An answer in which the allegations of a complaint are contested shall contain:

(i) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such an answer, the

respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

(c) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

[74 FR 1820, Jan. 13, 2009]

### § 3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act.

(a) *Notice of hearing.* When the Commission, acting under § 1.26(g) of this chapter, determines that objections which have been filed are sufficient to warrant the holding of an adjudicative hearing in rulemaking proceedings under the Fair Packaging and Labeling Act, or when the Commission otherwise determines that the holding of such a hearing would be in the public interest, a hearing will be held before an Administrative Law Judge for the purpose of receiving evidence relevant and material to the issues raised by such objections or other issues specified by the Commission. In such case the Commission will publish a notice in the FEDERAL REGISTER containing a statement of:

(1) The provisions of the rule or order to which objections have been filed;

(2) The issues raised by the objections or the issues on which the Commission wishes to receive evidence;

(3) The time and place for hearing, the time to be at least thirty (30) days after publication of the notice; and

(4) The time within which, and the conditions under which, any person who petitioned for issuance, amendment, or repeal of the rule or order, or any person who filed objections sufficient to warrant the holding of the hearing, or any other interested person, may file notice of intention to participate in the proceeding.

(b) *Parties.* Any person who petitions for issuance, amendment, or repeal of a

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rule or order, and any person who files objections sufficient to warrant the holding of a hearing, and who files timely notice of intention to participate, shall be regarded as a party and shall be individually served with any pleadings filed in the proceeding. Upon written application to the Administrative Law Judge and a showing of good cause, any interested person may be designated by the Administrative Law Judge as a party.

[32 FR 8449, June 13, 1967, as amended at 40 FR 33969, Aug. 13, 1975]

#### § 3.14 Intervention.

(a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of § 4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

(b) In an adjudicative proceeding where the complaint states that divestiture relief is contemplated, the labor organization[s] representing employees of the respondent[s] may intervene as a matter of right. Applications for such intervention are to be made in accordance with the procedures set forth in paragraph (a) of this section and must be filed within 60 days of the issuance of the complaint. Intervention as a matter of right shall be limited to the issue of the effect, if any, of proposed remedies on employment, with full rights of participation in the proceeding concerning this issue. This paragraph does not affect a labor organization's ability to petition for leave to intervene pursuant to § 3.14(a).

[32 FR 8449, June 13, 1967, as amended at 46 FR 20979, Apr. 8, 1981]

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#### § 3.15 Amendments and supplemental pleadings.

(a) *Amendments*—(1) *By leave*. If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however*, That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence*. When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(b) *Supplemental pleadings*. The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved.

#### Subpart C—Prehearing Procedures; Motions; Interlocutory Appeals; Summary Decisions

##### § 3.21 Prehearing procedures.

(a) *Meeting of the parties before scheduling conference*. As early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, but in any event no later than 5 days after the answer is filed by the last answering respondent, counsel for the parties shall meet to discuss the nature and basis of their claims

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and defenses and the possibilities for a prompt settlement or resolution of the case. The parties shall also agree, if possible, on—

(1) A proposed discovery plan specifically addressing a schedule for depositions of fact witnesses, the production of documents and electronically stored information, and the timing of expert discovery pursuant to § 3.31A. The parties' agreement regarding electronically stored information should include the scope of and a specified time period for the exchange of such information that is subject to §§ 3.31(b)(2), 3.31(c), and 3.37(a), and the format for the disclosure of such information, consistent with §§ 3.31(c)(3) and 3.37(c);

(2) A preliminary estimate of the time required for the evidentiary hearing; and

(3) Any other matters to be determined at the scheduling conference.

(b) *Scheduling conference.* Not later than 10 days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address:

(1) Their factual and legal theories;

(2) The current status of any pending motions;

(3) A schedule of proceedings that is consistent with the date of the evidentiary hearing set by the Commission;

(4) Steps taken to preserve evidence relevant to the issues raised by the claims and defenses;

(5) The scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan, including the disclosure of electronically stored information;

(6) Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial, and any request to bifurcate issues, claims or defenses; and

(7) Other possible agreements or steps that may aid in the just and expeditious disposition of the proceeding and to avoid unnecessary cost.

(c) *Prehearing scheduling order.* (1) Not later than 2 days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and

establishes a schedule of proceedings that will permit the evidentiary hearing to commence on the date set by the Commission, including a plan of discovery that addresses the deposition of fact witnesses, timing of expert discovery, and the production of documents and electronically stored information, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference. The Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint.

(2) The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by

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deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) *Additional prehearing conferences and orders.* The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the just and expeditious disposition of the proceeding and to avoid unnecessary cost. Such conferences shall be held in person to the extent practicable.

(g) *Public access and reporting.* Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

[74 FR 1820, Jan. 13, 2009]

#### § 3.22 Motions.

(a) *Presentation and disposition.* Motions filed under § 3.26 or § 4.17 shall be directly referred to and ruled on by the Commission. Motions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge. Motions not referred to the Administrative Law Judge shall be ruled on by the Commission within 45 days of the filing of the last-filed answer or reply to the motion, if any, unless the Commission determines there is good cause to extend the deadline. If the Commission refers the motion to the Administrative Law Judge, it may set a deadline for the ruling by the Administrative Law Judge, and a party may seek review of the ruling of the Administrative Law Judge in accordance with § 3.23. During the time a proceeding is before an Administrative Law Judge, all other motions shall be addressed to and decided by the Administrative Law Judge, if within his or her authority.

The Administrative Law Judge shall certify to the Commission a motion to disqualify filed under § 3.42(g) if the Administrative Law Judge does not disqualify himself or herself within 10 days. The Administrative Law Judge shall certify to the Commission forthwith any other motion upon which he or she has no authority to rule. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed. All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(b) *Proceedings not stayed.* A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.

(c) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words. These word count limitations include headings, footnotes, and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). Documents that fail to comply with these provisions shall

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not be filed with the Secretary. Motions must also include the name, address, telephone number, fax number, and e-mail address (if any) of counsel and attach a draft order containing the proposed relief. If a party includes in a motion information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file 2 versions of the motion in accordance with the procedures set forth in § 3.45(e). The party shall mark its confidential filings with brackets or similar conspicuous markings to indicate the material for which it is claiming confidential treatment. The time period specified by § 3.22(d) within which an opposing party may file an answer will begin to run upon service on that opposing party of the confidential version of the motion.

(d) *Responses.* Within 10 days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the opposing party shall file 2 versions of the answer in accordance with the procedures set forth in § 3.45(e). The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief. The reply may be conditionally filed with the motion seeking leave to reply. Any reply with respect to a dispositive motion, or any permitted reply to any other motion, shall be filed within 5 days after service of the last answer to that motion.

(e) *Rulings on motions.* Unless otherwise provided by a relevant rule, the Administrative Law Judge shall rule on motions within 14 days after the filing of all motion papers authorized by this section. The Commission, for good cause, may extend the time allowed for a ruling.

(f) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(g) *Statement.* Each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), and each motion for enforcement pursuant to § 3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

[74 FR 1821, Jan. 13, 2009]

### § 3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.* (1) The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(i) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to § 3.36, if such appeal is based

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solely on a claim of privilege: *Provided*, that the Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of non-public Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, an individual Commissioner, or the Office of the General Counsel;

(ii) Suspends an attorney from participation in a particular proceeding pursuant to § 3.42(d); or

(iii) Grants or denies an application for intervention pursuant to the provisions of § 3.14.

(2) Appeal from such rulings may be sought by filing with the Commission an application for review within 3 days after notice of the Administrative Law Judge's ruling. An answer may be filed within 3 days after the application for review is filed. The Commission upon its own motion may enter an order staying compliance with a discovery demand authorized by the Administrative Law Judge pursuant to § 3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of memoranda of law if deemed appropriate by the Commission.

(b) *Other interlocutory appeals.* A party may request the Administrative Law Judge to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. An answer may be filed within 3 days after the application for review is filed. The Administrative Law Judge shall issue a ruling on the request for determination within 3 days of the deadline for filing an answer. The party may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge has issued the requested determination or 1 day after the deadline has passed for the Admin-

istrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling.

(c) The application for review shall attach the ruling from which appeal is being taken and any other portions of the record on which the moving party relies. Neither the application for review nor the answer shall exceed 2,500 words. This word count limitation includes headings, footnotes, and quotations, but does not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). The Commission may order additional briefing on the application.

(d) *Ruling on application for review.* Within 3 days after the deadline for filing an answer, the Commission will determine whether to grant the application for review. The denial of an application shall not constitute a ruling on the merits of the ruling that is the subject of the application.

(e) *Proceedings not stayed.* An application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

[74 FR 1822, Jan. 13, 2009]

### § 3.24 Summary decisions.

(a) *Procedure.* (1) Any party may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Counsel in support of the complaint may so move at any time after 20 days following issuance of the complaint and any respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to § 3.21, but in any case at least 30 days before the date fixed for the hearing.

(2) Any other party may, within 14 days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in § 3.24(a)(3). The parties may file memoranda of law in support of, or in opposition to, the motion consistent with § 3.22(c). If a party includes in any such brief or memorandum information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file 2 versions of the document in accordance with the procedures set forth in § 3.45(e). If the Commission (or, when appropriate, the Administrative Law Judge) determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order. In the event that the motion has been referred to the Administrative Law Judge, such determination by the Administrative Law Judge shall constitute his or her initial decision and shall conform to the procedures set forth in § 3.51(c). A summary decision, interlocutory in character and in compliance with the procedures set forth in § 3.51(c), may be rendered on the issue of liability alone although there is a genuine issue as to relief.

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Commission (or, when appropriate, the Administrative Law Judge) may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that it cannot, for reasons stated, present by affidavit facts essential to justify its opposition, the Commission (or, when appropriate, the Administrative Law Judge) may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Commission (or, when appropriate, the Administrative Law Judge) shall issue an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

(b) *Affidavits filed in bad faith.* (1) Should it appear to the satisfaction of the Commission (or, when appropriate, the Administrative Law Judge) at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Commission (or, when appropriate, the Administrative Law Judge) shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Commission (or, when appropriate, the Administrative Law Judge) concludes that action to suspend or remove an attorney from the case is warranted, it shall take action as specified in § 3.42(d). If the Administrative Law Judge to whom the Commission has referred a motion for summary decision concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the Administrative Law Judge shall certify the matter,

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with his or her findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules. If the Commission has addressed the motion directly, it may consider such disciplinary action without a certification by the Administrative Law Judge.

[74 FR 1822, Jan. 13, 2009]

#### § 3.25 Consent agreement settlements.

(a) The Administrative Law Judge may, in his or her discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering a proposed settlement. Such motion shall be filed with the Secretary of the Commission, as provided in § 4.2. Any such motion shall be accompanied by a consent proposal; the proposal itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the consent proposal affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this paragraph shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If a consent agreement accompanying the motion has been executed by one or more respondents and by complaint counsel, has been approved by the appropriate Bureau Director, and conforms to § 2.32, and the matter is pending before an Administrative Law Judge, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section. If a consent proposal is not in the form of a consent agreement executed by a respondent, does not otherwise conform to § 2.32, or has not been executed by

complaint counsel, and the matter is pending before the Administrative Law Judge, he or she shall certify the motion and proposal to the Commission upon a written determination that there is a reasonable possibility of settlement. The certification may be accompanied by a recommendation to the Commission as to the disposition of the motion. The Administrative Law Judge shall make a determination as to whether to certify the motion within 5 days after the filing of the motion. The filing of a motion under paragraph (b) of this section and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission shall so order. Upon certification of such motion, the Commission in its discretion may issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal.

(d) If the matter is no longer pending before the Administrative Law Judge, the Commission in its discretion may, upon motion filed under paragraph (b) of this section, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal. Such order may issue whether or not the consent proposal is in the form of a consent agreement executed by a respondent, otherwise conforms to § 2.32, or has been executed by complaint counsel.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraphs (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After some or all of the allegations in a matter have been withdrawn from adjudication, the Commission may accept a proposed consent agreement, reject it and return the matter or affected portions thereof to adjudication for further proceedings, or take such other action as it may deem appropriate. If an agreement is accepted, it will be disposed of as provided in

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§ 2.34 of this chapter, except that if, following the public comment period provided for in § 2.34, the Commission decides, based on comments received or otherwise, to withdraw its acceptance of the agreement, it will so notify the parties and will return to adjudication any portions of the matter previously withdrawn from adjudication for further proceedings or take such other action it considers appropriate.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

[74 FR 20208, May 1, 2009]

### § 3.26 Motions following denial of preliminary injunctive relief.

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. If the Commission has filed a request for a stay, injunction, or other emergency relief pending appeal to a court of appeals, the motion must be filed within 14 days after, but no earlier than, the court of appeals has denied the Commission's request. In cases in which the Commission has not sought relief from the court of appeals within 7 days following the denial of a preliminary injunction, the motion must be filed within 14 days after the district court has denied preliminary relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed jointly or

separately by each of the respondents in the adjudicative proceeding. Complaint counsel may file a response within 14 days after such motion is filed. The matter will not be withdrawn from adjudication unless the Commission so directs.

(d) *Consideration on the record.* Instead of a motion to withdraw the matter from adjudication, any respondent or respondents may file a motion under this paragraph to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation after a court has denied preliminary injunctive relief to the Commission. Complaint counsel may file a response within 14 days after such motion is filed. The filing of a motion to dismiss shall not stay the proceeding unless the Commission so directs.

(e) *Form.* Memoranda in support of or in opposition to such motions shall not exceed 10,000 words. This word count limitation includes headings, footnotes, and quotations, but does not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e).

(f) *In camera materials.* If any filing includes materials that are subject to confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *in camera* materials for purposes of this paragraph and the party shall file 2 versions of the document in accordance with the procedures set forth in § 3.45(e). The time within which complaint counsel may file an answer under this paragraph will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

(g) *Ruling by Commission.* The Commission shall rule on any motion authorized by this section within 30 days after the filing of the motion and any memoranda in support of or in opposition to the motion.

[74 FR 1823, Jan. 13, 2009]

### Subpart D—Discovery; Compulsory Process

#### § 3.31 General discovery provisions.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Except as provided in the rules, or unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery. Unless all parties expressly agree otherwise, no discovery shall take place before the issuance of a prehearing scheduling order under § 3.21(c), except for the mandatory initial disclosures required by paragraph (b) of this section.

(b) *Mandatory initial disclosures.* Complaint counsel and respondent's counsel shall, within 5 days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); and

(2) A copy of, or a description by category and location of, all documents and electronically stored information including declarations, transcripts of investigational hearings and depositions, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); unless such information or materials are subject to the limitations in § 3.31(c)(2), privileged as defined in § 3.31(c)(4), pertain to hearing preparation as defined in § 3.31(c)(5), pertain to experts as defined in § 3.31A, or are obtainable from

some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation.

(c) *Scope of discovery.* Unless otherwise limited by order of the Administrative Law Judge or the Commission in accordance with these rules, the scope of discovery under all the rules in this part is as follows:

(1) *In general.* Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition, and location of any books, documents, other tangible things, electronically stored information, and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.* Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to § 3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under these rules is required to search for materials generated and transmitted between an entity's counsel (including counsel's legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good

cause to provide such materials. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he or she determines that:

(i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

(3) *Electronically stored information.* A party or third party need not provide discovery of electronically stored information from sources that the party or third party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery, the party or third party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the Administrative Law Judge may nonetheless order discovery if the requesting party shows good cause, considering the limitations of paragraph (c)(2). The Administrative Law Judge may specify conditions for the discovery.

(4) *Privilege.* Discovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(5) *Hearing preparations: Materials.* Subject to the provisions of § 3.31A, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the prepa-

ration of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(d) *Protective orders; orders to preserve evidence.* In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section. The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Such an order may also be issued to preserve evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(e) *Supplementation of disclosures and responses.* A party who has made a mandatory initial disclosure under § 3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its mandatory initial disclosures under § 3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty to amend in a timely manner a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

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(f) *Stipulations.* When approved by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

(g) *Disclosure of privileged or protected information or communications; scope of waiver; obligations of receiving party.*

(1)(i) The disclosure of privileged or protected information or communications during a part 3 proceeding or during a Commission precomplaint investigation shall not operate as a waiver if:

(A) The disclosure is inadvertent;

(B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

(ii) After being notified, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the Administrative Law Judge under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(2) The disclosure of privileged or protected information or communications during a part 3 proceeding or during a Commission precomplaint investigation shall waive the privilege or protection as to undisclosed information or communications only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or communications concern the same subject matter; and

(iii) They ought in fairness to be considered together.

(h) *Restriction on filings.* Unless otherwise ordered by the Administrative Law Judge in his or her discretion, mandatory initial and supplemental

disclosures, interrogatories, depositions, requests for documents, requests for admissions, and answers and responses thereto shall be served upon other parties but shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission, except to support or oppose a motion or to offer as evidence.

#### APPENDIX A TO § 3.31: STANDARD PROTECTIVE ORDER.

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged information, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any other federal statute or regulation, or under any federal court or Commission precedent interpreting such statute or regulation, as well as any information that discloses the substance of the contents of any confidential materials derived from a document subject to this Order, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential

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material for the purposes of this Order where the submitter has requested such confidential treatment.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL—FTC Docket No. XXXX" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL—FTC Docket No. XXXX" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions masked or redacted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been masked or redacted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affili-

ated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the

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disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

[74 FR 1824, Jan. 13, 2009, as amended at 74 FR 20309, May 1, 2009; 76 FR 52251, 52252, Aug. 22, 2011]

#### §3.31A Expert discovery.

(a) The parties shall serve each other with a list of experts they intend to call as witnesses at the hearing not later than 1 day after the close of fact discovery, meaning the close of discovery except for depositions and other discovery permitted under §3.24(a)(4), and discovery for purposes of authenticity and admissibility of exhibits. Complaint counsel shall serve the

other parties with a report prepared by each of its expert witnesses not later than 14 days after the close of fact discovery. Each respondent shall serve each other party with a report prepared by each of its expert witnesses not later than 14 days after the deadline for service of complaint counsel's expert reports. Complaint counsel shall serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 10 days after the deadline for service of respondent's expert reports. Aside from any information required by paragraph (c), a rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports. If material outside the scope of fair rebuttal is presented, a respondent may file a motion not later than 5 days after the deadline for service of complaint counsel's rebuttal reports, seeking appropriate relief with the Administrative Law Judge, including striking all or part of the report, leave to submit a surrebuttal report by respondent's experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(b) No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

(c) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years. A rebuttal or surrebuttal report need not include any

information already included in the initial report of the witness.

(d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Unless otherwise ordered by the Administrative Law Judge, a deposition of any expert witness shall be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a) of this section. Depositions of expert witnesses shall be completed not later than 65 days after the close of fact discovery. Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing. A party may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded, or any communications between another party's attorney and any of that other party's testifying experts, regardless of the form of the communications, except to the extent that the communications:

(1) Relate to compensation for the expert's study or testimony;

(2) Identify facts or data that the other party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(3) Identify assumptions that the other party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(f) The Administrative Law Judge may, upon a finding of good cause, alter the pre-hearing schedule set forth in this section; provided, however, that no such alteration shall affect the date of the evidentiary hearing noticed in the complaint.

[74 FR 1826, Jan. 13, 2009, as amended at 76 FR 52252, Aug. 22, 2011]

### § 3.32 Admissions.

(a) At any time after thirty (30) days after issuance of complaint, or after publication of notice of an adjudicative

hearing in a rulemaking proceeding under § 3.13, any party may serve on any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth. A copy of the request shall be filed with the Secretary.

(b) The matter is admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, with a copy filed with the Secretary, a sworn written answer or objection addressed to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it.

(c) Any matter admitted under this rule is conclusively established unless

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the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[43 FR 56865, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

#### § 3.33 Depositions.

(a) *In general.* Any party may take a deposition of any named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1) and subject to the requirements in § 3.36. Such party may, by motion, obtain from the Administrative Law Judge an order to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. The party seeking the deposition shall serve upon each person whose deposition is sought and upon each party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them. The parties may stipulate in writing or the Administrative Law Judge may upon motion order that a deposition be taken by telephone or other remote electronic

means. A deposition taken by such means is deemed taken at the place where the deponent is to answer questions.

(b) The Administrative Law Judge may rule on motion by a party that a deposition shall not be taken upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b). The fact that a witness testifies at an investigative hearing does not preclude the deposition of that witness.

(c)(1) *Notice to corporation or other organization.* A party may name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(2) *Notice to Commission.* Except as provided in § 3.31(h), notices of depositions shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any party shall have the right to question him or her. Objections to questions or to evidence presented shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made, shall be recorded and certified by the officer. Thereafter, upon payment of the charges therefor, the officer shall furnish a copy of the

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deposition to the deponent and to any party.

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) The name and address of the person who is to answer them, and

(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of § 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him or her. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) *Correction of deposition.* A deposition may be corrected, as to form or substance, in the manner provided by § 3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him or her, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer

shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under § 3.33(g)(2)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his or her remarks, stating with specificity the alleged errors in the transcript.

(g) *Objections; errors and irregularities*—(1) *Objections to admissibility.* Subject to the provisions of paragraph (g)(2) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(2) *Effect of errors and irregularities in depositions*—(i) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) *As to taking of deposition.* (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind

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which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions are waived unless served in writing upon all parties within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(iv) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or with due diligence might have been ascertained.

[74 FR 1827, Jan. 13, 2009]

### § 3.34 Subpoenas.

(a) *Subpoenas ad testificandum.* Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena or to attend and give testimony at an adjudicative hearing.

(b) *Subpoenas duces tecum; subpoenas to permit inspection of premises.* Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term “documents” includes written materials, electronically stored information, and tangible things. A subpoena *duces tecum* may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with

reasonable particularity the materials to be produced.

(c) *Motions to quash; limitation on subpoenas.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by § 3.22(g). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas except in accordance with §§ 3.31(c)(2) and 3.36.

[74 FR 1828, Jan. 13, 2009]

### § 3.35 Interrogatories to parties.

(a) *Availability; procedures for use.* (1) Any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories. The Administrative Law Judge may allow a shorter or longer time.

(3) Except as provided in § 3.31(h), interrogatories shall not be filed with the

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Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(b) *Scope; use at hearing.* (1) Interrogatories may relate to any matters that can be inquired into under § 3.31(c)(1), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but such an interrogatory need not be answered until after designated discovery has been completed, but in no case later than 3 days before the final pretrial conference.

(c) *Option to produce records.* Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

[74 FR 1828, Jan. 13, 2009]

### **§ 3.36 Applications for subpoenas for records of or appearances by certain officials or employees of the Commission or officials or employees of governmental agencies other than the Commission, and subpoenas to be served in a foreign country.**

(a) *Form.* An application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a request requiring the production of or access to documents, other tangible things, or electronically stored information for the purposes de-

scribed in § 3.37(a), in the possession, custody, or control of the Commissioners, the General Counsel, any Bureau or Office not involved in the matter, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of a Commissioner, the General Counsel, an official of any Bureau or Office not involved in the matter, an Administrative Law Judge, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or of an official or employee of another governmental agency, or for the issuance of a subpoena to be served in a foreign country, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall make a showing that:

(1) The material sought is reasonable in scope;

(2) If for purposes of discovery, the material falls within the limits of discovery under § 3.31(c)(1), or, if for an adjudicative hearing, the material is reasonably relevant;

(3) If for purposes of discovery, the information or material sought cannot reasonably be obtained by other means or, if for purposes of compelling a witness to appear at the evidentiary hearing, the movant has a compelling need for the testimony;

(4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery or testimony is sought and that any additional procedural requirements have been or will be met before the subpoena is served; and

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(5) If the subpoena requires access to documents or other tangible things, it meets the requirements of § 3.37.

(c) *Execution.* If an Administrative Law Judge issues an order authorizing a subpoena pursuant to this section, the moving party may forward to the Secretary a request for the authorized subpoena, with a copy of the authorizing order attached. Each such subpoena shall be signed by the Secretary; shall have attached to it a copy of the authorizing order; and shall be served by the moving party only in conjunction with a copy of the authorizing order.

[74 FR 1828, Jan. 13, 2009]

#### **§ 3.37 Production of documents, electronically stored information, and any tangible things; access for inspection and other purposes.**

(a) *Availability; procedures for use.* Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents or electronically stored information, as defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of § 3.31(c)(1) and in the possession, custody, or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be produced or inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the production or inspection and performing the related acts. Each request may specify the form in which electronically stored information is to be produced, but the requested form of electronically stored information must not be overly burdensome or unnecessarily costly to the producing party. A party shall make documents available as they are kept

in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34. Except as provided in § 3.31(h), requests under this section shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(b) *Response; objections.* No more than 30 days after receiving the request, the response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the party must state the form it intends to use. The party submitting the request may move for an order under § 3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Production of documents or electronically stored information.* Unless otherwise stipulated or ordered by the Administrative Law Judge, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form in which it is ordinarily maintained or in a reasonably usable form; and

(iii) A party need not produce the same electronically stored information in more than one form.

[74 FR 1829, Jan. 13, 2009]

**§ 3.38 Motion for order compelling disclosure or discovery; sanctions.**

(a) *Motion for order to compel.* A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37. Any memorandum in support of such motion shall be no longer than 2,500 words. Any response to the motion by the opposing party must be filed within 5 days of receipt of service of the motion and shall be no longer than 2,500 words. These word count limitations include headings, footnotes, and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). The Administrative Law Judge shall rule on a motion to compel within 3 business days of the date in which the response is due. Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that an initial disclosure or an answer to any requests for admissions, documents, depositions, or interrogatories be served or disclosure otherwise be made.

(b) If a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to the following:

(1) Order that any answer be amended to comply with the request, subpoena, or order;

(2) Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;

(3) Rule that for the purposes of the proceeding the matter or matters con-

cerning which the order or subpoena was issued be taken as established adversely to the party;

(4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;

(5) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(6) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order, he or she shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

[74 FR 1829, Jan. 13, 2009]

**§ 3.38A Withholding requested material.**

(a) Any person withholding material responsive to a subpoena issued pursuant to § 3.34 or § 3.36, written interrogatories requested pursuant to § 3.35, a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the

subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in § 3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

(b) A person withholding material for reasons described in § 3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5 of the FTC Act (15 U.S.C. 45))

[74 FR 1830, Jan. 13, 2009]

**§ 3.39 Orders requiring witnesses to testify or provide other information and granting immunity.**

(a) Where Commission complaint counsel desire the issuance of an order requiring a witness or deponent to testify or provide other information and granting immunity under 18 U.S.C. 6002, Directors and Assistant Directors of Bureaus and Regional Directors and Assistant Regional Directors of Commission Regional Offices who supervise complaint counsel responsible for presenting evidence in support of the complaint are authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against self-incrimination; and to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of such order. Upon receipt of approval by the Attorney General (or his or her designee), the Administrative Law Judge is authorized to issue an order requiring the witness or deponent to testify or provide other information and granting immunity when the witness or deponent has invoked

his or her privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(b) Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6002 may be made to the Administrative Law Judge and may be made *ex parte*. When such requests are made, the Administrative Law Judge is authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against self-incrimination; and, upon making such determinations, to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; and, after the Attorney General (or his or her designee) has granted such approval, to issue such order when the witness or deponent has invoked his or her privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(18 U.S.C. 6002, 6004)

[74 FR 1830, Jan. 13, 2009]

**§ 3.40 Admissibility of evidence in advertising substantiation cases.**

(a) If a person, partnership, or corporation is required through compulsory process under section 6, 9 or 20 of the Act issued after October 26, 1977 to submit to the Commission substantiation in support of an express or an implied representation contained in an advertisement, such person, partnership or corporation shall not thereafter be allowed, in any adjudicative proceeding in which it is alleged that the person, partnership, or corporation lacked a reasonable basis for the representation, and for any purpose relating to the defense of such allegation, to introduce into the record, whether directly or indirectly through references

contained in documents or oral testimony, any material of any type whatsoever that was required to be but was not timely submitted in response to said compulsory process. *Provided, however*, that a person, partnership, or corporation is not, within the meaning of this section, required through compulsory process to submit substantiation with respect to those portions of said compulsory process to which such person, partnership, or corporation has raised good faith legal objections in a timely motion pursuant to the Commission's Rules of Practice and Procedure, until the Commission denies such motion; or if the person, partnership, or corporation thereafter continues to refuse to comply, until such process has been judicially enforced.

(b) The Administrative Law Judge shall, upon motion, at any stage exclude all material that was required to be but was not timely submitted in response to compulsory process described in paragraph (a) of this section, or any reference to such material, unless the person, partnership, or corporation demonstrates in a hearing, and the Administrative Law Judge finds, that by the exercise of due diligence the material could not have been timely submitted in response to the compulsory process, and that the Commission was notified of the existence of the material immediately upon its discovery. Said findings of the Administrative Law Judge shall be in writing and shall specify with particularity the evidence relied upon. The rules normally governing the admissibility of evidence in Commission proceedings shall in any event apply to any material coming within the above exception.

[42 FR 56500, Oct. 10, 1977; 42 FR 61450, Dec. 5, 1977, as amended at 45 FR 45578, July 7, 1980]

### Subpart E—Hearings

#### § 3.41 General hearing rules.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public unless an *in camera* order is entered by the Administrative Law Judge pursuant to § 3.45(b) of this chapter or unless otherwise ordered by the Commission.

(b) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at

one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. The hearing will take place on the date specified in the notice accompanying the complaint, pursuant to § 3.11(b)(4), and should be limited to no more than 210 hours. The Commission, upon a showing of good cause, may order a later date for the evidentiary hearing to commence or extend the number of hours for the hearing. Consistent with the requirements of expedition:

(1) The Administrative Law Judge may order hearings at more than one place and may grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the prehearing procedure if the Administrative Law Judge determines that such recess will materially expedite the ultimate disposition of the proceeding.

(2) When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Commission or the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions; the Commission or the Administrative Law Judge may order all the actions consolidated; and the Commission or the Administrative Law Judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(3) When separate hearings will be conducive to expedition and economy, the Commission or the Administrative Law Judge may order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues.

(4) Each side shall be allotted no more than half of the trial time within which to present its opening statements, *in limine* motions, all arguments excluding the closing argument, direct or cross examinations, or other evidence.

(5) Each side shall be permitted to make an opening statement that is no more than 2 hours in duration.

(6) Each side shall be permitted to make a closing argument no later than 5 days after the last filed proposed findings. The closing argument shall last no longer than 2 hours.

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(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(d) *Adverse witnesses.* An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(e) Requests for an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6002 shall be disposed of in accordance with § 3.39.

(f) *Collateral federal court actions.* The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs. A stay shall toll any deadlines set by the rules.

[74 FR 1830, Jan. 13, 2009]

#### § 3.42 Presiding officials.

(a) *Who presides.* Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges; and the term *Administrative Law Judge* as used in this part means and applies to the Commission or any of its members when so sitting.

(b) *How assigned.* The presiding Administrative Law Judge shall be designated by the Chief Administrative Law Judge or, when the Commission or one or more of its members preside, by the Commission, who shall notify the parties of the Administrative Law Judge designated.

(c) *Powers and duties.* Administrative Law Judges shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpoenas and orders requiring answers to questions;

(3) To take depositions or to cause depositions to be taken;

(4) To compel admissions, upon request of a party or on their own initiative;

(5) To rule upon offers of proof and receive evidence;

(6) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose;

(8) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;

(9) To make and file initial decisions;

(10) To certify questions to the Commission for its determination;

(11) To reject written submissions that fail to comply with rule requirements, or deny *in camera* status without prejudice until a party complies with all relevant rules; and

(12) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in title 5, U.S.C.

(d) *Suspension of attorneys by Administrative Law Judge.* The Administrative Law Judge shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding. Any attorney so suspended or barred may appeal to the Commission in accordance with the provisions of § 3.23(a). The appeal shall not operate to suspend the hearing unless otherwise ordered by the Administrative Law Judge or the Commission; in the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

(e) *Substitution of Administrative Law Judge.* In the event of the substitution of a new Administrative Law Judge for

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the one originally designated, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(f) *Interference.* In the performance of their adjudicative functions, Administrative Law Judges shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission, and all direction by the Commission to Administrative Law Judges concerning any adjudicative proceedings shall appear in and be made a part of the record.

(g) *Disqualification of Administrative Law Judges.* (1) When an Administrative Law Judge deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record and shall notify the Director of Administrative Law Judges of such withdrawal.

(2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law Judge does not disqualify himself within ten (10) days, he shall certify the motion to the Commission, together with any statement he may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose.

(3) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(h) *Failure to comply with Administrative Law Judge's directions.* Any party who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission. The circumstances of any such neglect, refusal, or failure, to-

gether with a recommendation for appropriate action, shall be promptly certified by the Administrative Law Judge to the Commission. The Commission may make such orders in regard thereto as the circumstances may warrant.

[32 FR 8449, June 13, 1967, as amended at 37 FR 5609, Mar. 17, 1972; 41 FR 8340, Feb. 26, 1976; 43 FR 56868, Dec. 4, 1978; 46 FR 45750, Sept. 15, 1981; 50 FR 53306, Dec. 31, 1985; 66 FR 17629, Apr. 3, 2001]

### § 3.43 Evidence.

(a) *Burden of proof.* Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to § 3.13, shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. If otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay. However, absent the consent of the parties, before admitting prior testimony (including expert reports) from other proceedings where either the Commission or respondent did not participate, except for other proceedings where the Commission and at least one respondent did participate, the Administrative Law Judge must

make a finding upon the motion of a party seeking the admission of such evidence that the prior testimony would not be duplicative, would not present unnecessary hardship to a party or delay to the proceedings, and would aid in the determination of the matter. Statements or testimony by a party-opponent, if relevant, shall be admitted.

(c) *Admissibility of third party documents.* Extrinsic evidence of authenticity as a condition precedent to admissibility of documents received from third parties is not required with respect to the original or a duplicate of a domestic record of regularly conducted activity by that third party that otherwise meets the standards of admissibility described in paragraph (b) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(1) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(2) Was kept in the course of the regularly conducted activity; and

(3) Was made by the regularly conducted activity as a regular practice.

(d) *Presentation of evidence.* (1) A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the Administrative Law Judge, may be required for a full and true disclosure of the facts.

(2) The Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(i) Make the interrogation and presentation effective for the ascertainment of the truth;

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(3) As respondents are in the best position to determine the nature of documents generated by such respondents

and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.

(e) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding

(f) *Official notice.* “Official notice” may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known within the Commission’s expertise or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

(g) *Objections.* Objections to evidence shall timely and briefly state the grounds relied upon, but the transcript shall not include argument or debate thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(h) *Exceptions.* Formal exception to an adverse ruling is not required.

(i) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he or she expects to prove by the answer of the witness, or the Administrative Law Judge may, in his or her discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

[74 FR 1831, Jan. 13, 2009, as amended at 76 FR 52252, Aug. 22, 2011]

### § 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter

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of the Commission under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. Upon a motion by any party, for good cause shown the Administrative Law Judge may order that the live oral testimony of all witnesses be video recorded digitally, at the expense of the moving party, and in such cases the video recording and the written transcript of the testimony shall be made part of the record. If a video recording is so ordered, the moving party shall not pay or retain any person or entity to perform such recording other than the reporter designated by the Commission to transcribe the proceeding, except by order of the Administrative Law Judge upon a finding of good cause. In any order allowing for video recording by a person or entity other than the Commission's designated reporter, the Administrative Law Judge shall prescribe standards and procedures for the video recording to ensure that it is a complete and accurate record of the witnesses' testimony. Copies of the written transcript and video recording are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter. Copies of a video recording made by a person or entity other than the reporter shall be available at the same rates, or no more than the actual cost of duplication, whichever is higher.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing

substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Commission.

(c) *Closing of the hearing record.* Upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record after giving the parties 3 business days to determine if the record is complete or needs to be supplemented. The Administrative Law Judge shall retain the discretion to permit or order correction of the record as provided in § 3.44(b).

[74 FR 1832, Jan. 13, 2009, as amended at 76 FR 52252, Aug. 22, 2011]

### § 3.45 *In camera* orders.

(a) *Definition.* Except as hereinafter provided, material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.

(b) *In camera treatment of material.* A party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. Parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days notice of the proposed use of such material. Each such motion must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear. The Administrative Law Judge shall order that such material, whether admitted or rejected, be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera*

treatment or after finding that the material constitutes sensitive personal information. “Sensitive personal information” shall include, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. For material other than sensitive personal information, a finding that public disclosure will likely result in a clearly defined, serious injury shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); see also *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The party submitting material for which *in camera* treatment is sought must provide, for each piece of such evidence and affixed to such evidence, the name and address of any person who should be notified in the event that the Commission intends to disclose *in camera* information in a final decision. No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including:

- (1) A description of the material;
- (2) A statement of the reasons for granting *in camera* treatment; and
- (3) A statement of the reasons for the date on which *in camera* treatment will expire, except in the case of sensitive personal information, which shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law. For *in camera* material other than sensitive personal information, an expiration date may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other rea-

sons why such material is entitled to *in camera* treatment for an indeterminate period. If an *in camera* order is silent as to duration, without explanation, then it will expire 3 years after its date of issuance. Material subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding, the notation “*In Camera* Record under § 3.45,” and the date on which *in camera* treatment expires. If the Administrative Law Judge has determined that *in camera* treatment should be granted for an indeterminate period, the notation should state that fact. Parties are not required to provide documents subject to *in camera* treatment, including documents obtained from third parties, to any individual or entity other than the Administrative Law Judge, counsel for other parties, and, during an appeal, the Commission or a federal court.

(c) *Release of in camera material.* *In camera* material constitutes part of the confidential records of the Commission and is subject to the provisions of § 4.11 of this chapter.

(d) *Briefs and other submissions referring to in camera or confidential information.* Parties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to *in camera* or other confidential information or general statements based on the content of such information.

(e) *When in camera or confidential information is included in briefs and other submissions.* If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked “*In Camera*” or “Subject to Protective Order,” as appropriate, on every page and shall be filed with the Secretary and served by the

party on the other parties in accordance with the rules in this part. Submitters of *in camera* or other confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. References to *in camera* or confidential material must be supported by record citations to relevant evidentiary materials and associated Administrative Law Judge *in camera* or other confidentiality rulings to confirm that *in camera* or other confidential treatment is warranted for such material. In addition, the document must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear, and providing the name and address of any person who should be notified of the Commission's intent to disclose in a final decision any of the *in camera* or otherwise confidential information in the document. Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document. An expurgated version of the document, marked "Public Record" on every page and omitting the *in camera* and confidential information and attachment that appear in the complete version, shall be filed with the Secretary within 5 days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served by the party on the other parties in accordance with the rules in this part. The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the *in camera* version.

(f) *When in camera or confidential information is included in rulings or recommendations of the Administrative Law Judge.* If the Administrative Law Judge includes in any ruling or recommendation information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the Administrative Law Judge shall file 2 versions of the ruling or recommendation. A complete version

shall be marked "*In Camera*" or "Subject to Protective Order," as appropriate, on every page and shall be served upon the parties. The complete version will be placed in the *in camera* record of the proceeding. An expurgated version, to be filed within 5 days after the filing of the complete version, shall omit the *in camera* and confidential information that appears in the complete version, shall be marked "Public Record" on every page, shall be served upon the parties, and shall be included in the public record of the proceeding. An expurgated version, to be filed within 5 days after the filing of the complete version, shall omit the *in camera* and confidential information that appears in the complete version, shall be marked "Public Record" on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

(g) *Provisional in camera rulings.* The Administrative Law Judge may make a provisional grant of *in camera* status to materials if the showing required in § 3.45(b) cannot be made at the time the material is offered into evidence but the Administrative Law Judge determines that the interests of justice would be served by such a ruling. Within 20 days of such a provisional grant of *in camera* status, the party offering the evidence or an interested third party must present a motion to the Administrative Law Judge for a final ruling on whether *in camera* treatment of the material is appropriate pursuant to § 3.45(b). If no such motion is filed, the Administrative Law Judge may either exclude the evidence, deny *in camera* status, or take such other action as is appropriate.

[74 FR 1832, Jan. 13, 2009, as amended at 76 FR 52253, Aug. 22, 2011]

### § 3.46 Proposed findings, conclusions, and order.

(a) *General.* Within 21 days of the closing of the hearing record, each party may file with the Secretary for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be

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served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted *in camera* status pursuant to § 3.45(b), the party shall file 2 versions of the proposals in accordance with the procedures set forth in § 3.45(e). Reply findings of fact, conclusions of law, and briefs may be filed by each party within 10 days of service of the initial proposed findings.

(b) *Exhibit index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall include an index listing for each exhibit offered by the party and received in evidence:

- (1) The exhibit number, followed by
- (2) The exhibit's title or a brief description if the exhibit is untitled;
- (3) The transcript page at which the Administrative Law Judge ruled on the exhibit's admissibility or a citation to any written order in which such ruling was made;
- (4) The transcript pages at which the exhibit is discussed;
- (5) An identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary;
- (6) A cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and
- (7) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.

(c) *Witness index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall also include an index to the witnesses called by that party, to include for each witness:

- (1) The name of the witness;
  - (2) A brief identification of the witness;
  - (3) The transcript pages at which any testimony of the witness appears; and
  - (4) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.
- (d) *Stipulated indices.* As an alternative to the filing of separate indices, the parties are encouraged to stipulate to joint exhibit and witness indices at the time the first statement of pro-

posed findings of fact and conclusions of law is due to be filed.

(e) *Rulings.* The record shall show the Administrative Law Judge's ruling on each proposed finding and conclusion, except when the order disposing of the proceeding otherwise informs the parties of the action taken.

[74 FR 1833, Jan. 13, 2009]

## Subpart F—Decision

### § 3.51 Initial decision.

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order pursuant to § 3.46, within 85 days of the closing the hearing record pursuant to § 3.44(c) where the parties have waived the filing of proposed findings, or within 14 days after the granting of a motion for summary decision following a referral of such motion from the Commission. The Administrative Law Judge may extend any of these time periods by up to 30 days for good cause. The Commission may further extend any of these time periods for good cause. Except in cases subject to § 3.52(a), once issued, the initial decision shall become the decision of the Commission 30 days after service thereof upon the parties or 30 days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) *Exhaustion of administrative remedies.* An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) *Content, format for filing.* (1) An initial decision shall be based on a consideration of the whole record relevant

to the issues decided, and shall be supported by reliable and probative evidence. The initial decision shall include a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f).

(2) The initial decision shall be prepared in a common word processing format, such as WordPerfect or Microsoft Word, and shall be filed by the Administrative Law Judge with the Office of the Secretary in both electronic and paper versions.

(3) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(d) *By whom made.* The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he or she shall have become unavailable to the Commission.

(e) *Reopening of proceeding by Administrative Law Judge; termination of jurisdiction.* (1) At any time from the close of the hearing record pursuant to § 3.44(c) until the filing of his or her initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his or her initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

[74 FR 1834, Jan. 13, 2009]

### § 3.52 Appeal from initial decision.

(a) *Automatic review of cases in which the Commission sought preliminary relief in federal court; timing.* For proceedings with respect to which the Commission has sought preliminary relief in federal court under 15 U.S.C. 53(b), the Commission will review the initial decision without the filing of a notice of appeal.

(1) In such cases, any party may file objections to the initial decision or order of the Administrative Law Judge by filing its opening appeal brief, subject to the requirements in paragraph (c), within 20 days of the issuance of the initial decision. Any party may respond to any objections filed by another party by filing an answering brief, subject to the requirements of paragraph (d), within 20 days of service of the opening brief. Any party may file a reply to an answering brief, subject to the requirements of paragraph (e), within 5 days of service of the answering brief. Unless the Commission orders that there shall be no oral argument, it will hold oral argument within 10 days after the deadline for the filing of any reply briefs. The Commission will issue its final decision pursuant to § 3.54 within 45 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision pursuant to § 3.54 within 45 days after the deadline for the filing of any reply briefs.

(2) If no objections to the initial decision are filed, the Commission may in its discretion hold oral argument within 10 days after the deadline for the filing of objection. If no oral argument is scheduled, the Commission will issue its final decision pursuant to § 3.54 within 45 days after the deadline for the filing of objections.

(b) *Review in all other cases; timing.* (1) In all cases other than those subject to paragraph (a), any party may file objections to the initial decision or order of the Administrative Law Judge by filing a notice of appeal with the Secretary within 10 days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter

file a notice of appeal within 5 days after service of the first notice, or within 10 days after service of the initial decision, whichever period expires last.

(2) In such cases, any party filing a notice of appeal must perfect its appeal by filing its opening appeal brief, subject to the requirements in paragraph (c), within 30 days of the issuance of the initial decision. Any party may respond to the opening appeal brief by filing an answering brief, subject to the requirements of paragraph (d), within 30 days of service of the opening brief. Any party may file a reply to an answering brief, subject to the requirements of paragraph (e), within 7 days of service of the answering brief. Unless the Commission orders that there shall be no oral argument, it will hold oral argument within 15 days after the deadline for the filing of any reply briefs. The Commission will issue its final decision pursuant to § 3.54 within 100 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision pursuant to § 3.54 within 100 days after the deadline for the filing of any reply briefs.

(c) *Appeal brief.* (1) The opening appeal brief shall contain, in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(ii) A concise statement of the case, which includes a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(iii) A specification of the questions intended to be urged;

(iv) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon; and

(v) A proposed form of order for the Commission's consideration instead of

the order contained in the initial decision.

(2) The brief shall not, without leave of the Commission, exceed 14,000 words.

(d) *Answering brief.* The answering brief shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto, as well as arguments in response to the appellant's appeal brief. The answering brief shall not, without leave of the Commission, exceed 14,000 words.

(e) *Reply brief.* The reply brief shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 7,000 words. The Commission will not consider new arguments or matters raised in reply briefs that could have been raised earlier in the principal briefs. No further briefs may be filed except by leave of the Commission.

(f) *In camera information.* If a party includes in any brief to be filed under this section information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality provisions pursuant to a protective order, the party shall file 2 versions of the brief in accordance with the procedures set forth in § 3.45(e). The time period specified by this section within which a party may file an answering or reply brief will begin to run upon service on the party of the *in camera* or confidential version of a brief.

(g) *Signature.* (1) The original of each brief filed shall have a hand-signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a brief constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; that it complies with the applicable word count limitation; and that to the best of his or her knowledge, information, and belief, it complies with all the other rules in this part. If a brief is not

signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the brief has not been filed.

(h) *Oral argument.* All oral arguments shall be public unless otherwise ordered by the Commission. Oral arguments will be held in all cases on appeal or review to the Commission, unless the Commission otherwise orders upon its own initiative or upon request of any party made at the time of filing his or her brief. Oral arguments before the Commission shall be reported stenographically, unless otherwise ordered, and a member of the Commission absent from an oral argument may participate in the consideration and decision of the appeal in any case in which the oral argument is stenographically reported.

(i) *Corrections in transcript of oral argument.* The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretary, pursuant to delegation of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief "Order Correcting Transcript" whenever a joint motion to correct transcript is received.

(j) *Briefs of amicus curiae.* A brief of an amicus curiae may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission, except that such leave shall not be required when the brief is presented by an agency or officer of the United States; or by a State, territory, commonwealth, or the District of Columbia, or by an agency or officer of any of them. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant

and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an amicus curiae is desirable. Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed. A motion for an amicus curiae to participate in oral argument will be granted only for extraordinary reasons. An amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief.

(k) *Word count limitation.* The word count limitations in this section include headings, footnotes and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). Extensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.

[74 FR 1834, Jan. 13, 2009, as amended at 76 FR 52253, Aug. 22, 2011]

### **§ 3.53 Review of initial decision in absence of appeal.**

An order by the Commission placing a case on its own docket for review will set forth the scope of such review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

### **§ 3.54 Decision on appeal or review.**

(a) Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it

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could have exercised if it had made the initial decision.

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.

(c) In those cases where the Commission believes that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views.

(d) The order of the Commission disposing of adjudicative hearings under the Fair Packaging and Labeling Act will be published in the FEDERAL REGISTER and, if it contains a rule or regulation, will specify the effective date thereof, which will not be prior to the ninetieth (90th) day after its publication unless the Commission finds that emergency conditions exist necessitating an earlier effective date, in which event the Commission will specify in the order its findings as to such conditions.

### § 3.55 Reconsideration.

Within fourteen (14) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission. Any party desiring to oppose such a petition shall file an answer thereto within ten (10) days after service upon him of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Commission.

[32 FR 8449, June 13, 1967, as amended at 61 FR 50650, Sept. 26, 1996]

### 16 CFR Ch. I (1–12 Edition)

### § 3.56 Effective date of orders; application for stay.

(a) Other than consent orders, an order to cease and desist under section 5 of the FTC Act becomes effective upon the sixtieth day after service, except as provided in section 5(g)(3) of the FTC Act, and except for divestiture provisions, as provided in section 5(g)(4) of the FTC Act.

(b) Any party subject to a cease and desist order under section 5 of the FTC Act, other than a consent order, may apply to the Commission for a stay of all or part of that order pending judicial review. If, within 30 days after the application was received by the Commission, the Commission either has denied or has not acted on the application, a stay may be sought in a court of appeals where a petition for review of the order is pending.

(c) An application for stay shall state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The application shall address the likelihood of the applicant's success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) An application for stay shall be filed within 30 days of service of the order on the party. Such application shall be served in accordance with the provisions of § 4.4(b) of this part that are applicable to service in adjudicative proceedings. Any party opposing the application may file an answer within 5 business days after receipt of the application. The applicant may file a reply brief, limited to new matters raised by the answer, within 3 business days after receipt of the answer.

[60 FR 37748, July 21, 1995]

### Subpart G [Reserved]

### Subpart H—Reopening of Proceedings

### § 3.71 Authority.

Except while pending in a U.S. court of appeals on a petition for review

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(after the transcript of the record has been filed) or in the U.S. Supreme Court, a proceeding may be reopened by the Commission at any time in accordance with § 3.72. Any person subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final may file a request to reopen the proceeding in accordance with § 2.51.

[44 FR 40637, July 12, 1979]

### § 3.72 Reopening.

(a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will, except as provided in § 2.51, serve upon each person subject to such decision (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever an order to show cause is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause and answer thereto, if any, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in FEDERAL REGISTER) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an Administrative Law Judge. Unless otherwise ordered and insofar as practicable, hearings before an Administrative Law Judge to receive evidence shall be conducted in accordance with subparts B, C, D, and E of part 3 of this chapter. Upon conclusion of hearings before an Administrative Law Judge, the record and the Administrative Law Judge's recommendations shall be certified to the Commission for final disposition of the matter.

(3) *Termination of existing orders*—(i) *Generally.* Notwithstanding the foregoing provisions of this rule, and except as provided in paragraphs (b)(3)(ii) and (iii) of this section, an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued, or on January 2, 1996, whichever is later.

(ii) *Exception.* This paragraph applies to the termination of an order issued before August 16, 1995, where a complaint alleging a violation of the order was or is filed (with or without an accompanying consent decree) in federal court by the United States or the Federal Trade Commission while the order remains in force, either on or after August 16, 1995, or within the 20 years preceding that date. If more than one complaint was or is filed while the order remains in force, the relevant

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complaint for purposes of this paragraph will be the latest filed complaint. An order subject to this paragraph will terminate 20 years from the date on which a court complaint described in this paragraph was or is filed, except as provided in the following sentence. If the complaint was or is dismissed, or a federal court rules or has ruled that the respondent did not violate any provision of the order, and the dismissal or ruling was or is not appealed, or was or is upheld on appeal, the order will terminate according to paragraph (b)(3)(i) of this section as though the complaint was never filed; provided, however, that the order will not terminate between the date that such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal. The filing of a complaint described in this paragraph will not affect the duration of any order provision that has expired, or will expire, by its own terms. The filing of a complaint described in this paragraph also will not affect the duration of an order's application to any respondent that is not named in the complaint.

(iii) *Stay of Termination.* Any party to an order may seek to stay, in whole or part, the termination of the order as to that party pursuant to paragraph (b)(3)(i) or (ii) of this section. Petitions for such stays shall be filed in accordance with the procedures set forth in § 2.51 of these rules. Such petitions shall be filed on or before the date on which the order would be terminated pursuant to paragraph (b)(3)(i) or (ii) of this section. Pending the disposition of such a petition, the order will be deemed to remain in effect without interruption.

(iv) *Orders not terminated.* Nothing in § 3.72(b)(3) is intended to apply to *in camera* orders or other procedural or interlocutory rulings by an Administrative Law Judge or the Commission.

[32 FR 8449, June 13, 1967, as amended at 44 FR 40637, July 12, 1979; 45 FR 21623, Apr. 2, 1980; 60 FR 58515, Nov. 28, 1995]

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#### Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

AUTHORITY: 5 U.S.C. 504 and 5 U.S.C. 553(b).

SOURCE: 63 FR 36341, July 6, 1998, unless otherwise noted.

##### § 3.81 General provisions.

(a) *Purpose of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (called “the Act” in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adversary adjudicative proceedings under part 3 of this title. The rules in this subpart describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(1) *When an eligible party will receive an award.* An eligible party will receive an award when:

(i) It prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or

(ii) The agency's demand is substantially in excess of the decision of the adjudicative officer, and is unreasonable when compared with that decision, under all the facts and circumstances of the case. *Demand* means the express final demand made by the agency prior to initiation of the adversary adjudication, but does not include a recitation by the agency of the statutory penalty in the administrative complaint or elsewhere when accompanied by an express demand for a lesser amount.

(b) *When the Act applies.* (1) Section 504(a)(1) of the Act applies to any adversarial adjudicative proceeding pending before the Commission at any time after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date.

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(2) Section 504(a)(4) applies to any adversarial adjudicative proceeding pending before the Commission at any time on or after March 29, 1996.

(c) *Proceedings covered.* (1) The Act applies to all adjudicative proceedings under part 3 of the rules of practice as defined in § 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(2) [Reserved]

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(2) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than \$2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees; and

(vi) For purposes of receiving an award for fees and expenses for defending against an excessive Commission demand, any small entity, as that term is defined under 5 U.S.C. 601.

(3) Eligibility of a party shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to per-

sonal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(e) *Standards for awards.* (1) For a prevailing party:

(i) A prevailing applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.

(ii) An award to prevailing party will be reduced or denied if the applicant has unduly or unreasonably protracted

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the proceeding or if special circumstances make an award unjust.

(2) For a party defending against an excessive demand:

(i) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication related to defending against the excessive portion of a Commission demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case.

(ii) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the highest rate at which the Commission paid expert witnesses for similar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(5) Any award of fees or expenses under the Act is limited to fees and expenses incurred after initiation of the adversary adjudication and, with respect to excessive demands, the fees and expenses incurred in defending against the excessive portion of the demand.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may, upon its own initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than the rate specified in 5 U.S.C. 504(b)(1)(A) per hour in some or all the types of proceedings covered by this part. Rulemaking under this provision will be in accordance with Rules of Practice part 1, subpart C of this chapter.

### § 3.82 Information required from applicants.

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identity of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed; or, if the applicant has not prevailed, a showing that the Commission's demand was the final demand before initiation of the adversary adjudication and that it was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision;

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(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified; or, identification of the Commission's demand that is alleged to be excessive and unreasonable and an explanation as to why the demand was excessive and unreasonable;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of § 3.81(d);

(6) The amount of fees and expenses incurred after the initiation of the adjudicative proceeding or, in the case of a claim for defending against an excessive demand, the amount of fees and expenses incurred after the initiation of the adjudicative proceeding attributable to the excessive portion of the demand;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made; and

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the application and any affiliates (as defined in § 3.81(d)(6)) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if an applicant objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure, the applicant may submit that portion of the exhibit directly to the Administrative

Law Judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with § 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand, the application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity

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for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) *When an application may be filed—*

(1) For a prevailing party:

(i) An application may be filed not later than 30 days after the Commission has issued an order or otherwise taken action that results in final disposition of the proceeding.

(ii) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(2) For a party defending against an excessive demand:

(i) An application may be filed not later than 30 days after the Commission has issued an order or otherwise taken action that results in final disposition of the proceeding.

(ii) If review or reconsideration is sought or taken of a decision as to which an applicant believes the agency's demand was excessive and unreasonable, proceedings for the award of fees and expenses shall be stayed pending final disposition of the underlying controversy.

(3) For purposes of this subpart, *final disposition* means the later of—

(i) The date that the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to § 3.51(a);

(ii) The date that the Commission issues an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding; or

(iii) The date that the Commission issues a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

#### **§ 3.83 Procedures for considering applicants.**

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties as specified in §§ 4.2 and 4.4(b) of this chapter, except as pro-

vided in § 3.82(b)(2) for confidential financial information. The date the Office of the Secretary of the Commission receives the application is deemed the date of filing.

(b) *Answer to application.* (1) Within 30 days after service of an application, complaint counsel may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Administrative Law Judge upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of complaint counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Administrative Law Judge determines that the public interest requires such participation in order to permit full exploration of matters in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application. A proposed award settlement entered into in connection with a consent agreement covering the underlying proceeding will be considered in accordance with § 3.25. The Commission may request findings of fact or recommendations on the award settlement from the Administrative Law Judge. A proposed award settlement entered into after the underlying proceeding has been concluded will be considered and may be approved or disapproved by the Administrative Law Judge subject to Commission review under paragraph (h) of this section. If an applicant and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after closing proceedings on the application.

(1) *For a decision involving a prevailing party:* The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially

justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(2) *For a decision involving an excessive agency demand:* The decision shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That decision shall be based upon all the facts and circumstances of the case. The decision shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application by filing a notice of appeal under § 3.52(a), or the Commission may decide to review the decision on its own initiative, in accordance with § 3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative

proceeding has been sought by the applicant or any party to the proceeding.

[63 FR 36341, July 6, 1998, as amended at 76 FR 52253, Aug. 22, 2011]

## PART 4—MISCELLANEOUS RULES

### Sec.

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AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

### § 4.1 Appearances.

(a) *Qualifications*—(1) *Attorneys*—(i) *U.S.-admitted*. Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(ii) *European Community (EC)-qualified*. Persons who are qualified to practice law in a Member State of the European Community and authorized to practice before The Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission.

(iii) Any attorney desiring to appear before the Commission or an Administrative Law Judge may be required to show to the satisfaction of the Commission or the Administrative Law Judge his or her acceptability to act in that capacity.

(2) *Others*. (i) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf or himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(ii) At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.

(b) *Restrictions as to former members and employees*—(1) *General prohibition*. Except as provided in this section, or otherwise specifically authorized by the Commission, no former member or employee (“former employee” or “employee”) of the Commission may communicate to or appear before the Commission, as attorney or counsel, or otherwise assist or advise behind-the-scenes, regarding a formal or informal proceeding or investigation<sup>1</sup> (except that a former employee who is disqualified solely under paragraph (b)(1)(ii) or paragraph (b)(1)(iv) of this section, is not prohibited from assisting or advising behind-the-scenes) if:

(i) The former employee participated personally and substantially on behalf of the Commission in the same proceeding or investigation in which the employee now intends to participate;

(ii) The participation would begin within two years after the termination of the former employee’s service and,

<sup>1</sup>It is important to note that a new “proceeding or investigation” may be considered the same matter as a seemingly separate “proceeding or investigation” that was pending during the former employee’s tenure. This is because a “proceeding or investigation” may continue in another form or in part. In determining whether two matters are actually the same, the Commission will consider: the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the continuing existence of an important Federal interest. See 5 CFR 2637.201(c)(4). For example, where a former employee intends to participate in an investigation of compliance with a Commission order, submission of a request to reopen an order, or a proceeding with respect to reopening an order, the matter will be considered the same as the adjudicative proceeding or investigation that resulted in the order. A former employee who is uncertain whether the matter in which he seeks clearance to participate is wholly separate from any matter that was pending during his tenure should seek advice from the General Counsel or the General Counsel’s designee before participating.

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within a period of one year prior to the employee's termination, the proceeding or investigation was pending under the employee's official responsibility;

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), came to, or would be likely to have come to, the former employee's attention in the course of the employee's duties, (unless Commission staff determines that the nature of the documents or information is such that no present advantage could thereby be derived); or

(iv) The former employee's participation would begin within one year after the employee's termination and, at the time of termination, the employee was a member of the Commission or a "senior employee" as defined in 18 U.S.C. 207(c).

(2) *Clearance request required.* Any former employee, before participating in a Commission proceeding or investigation (see footnote 1), whether through an appearance before a Commission official or behind-the-scenes assistance, shall file with the Secretary a request for clearance to participate, containing the information listed in § 4.1(b)(4) if:

(i) The proceeding or investigation was pending in the Commission while the former employee served;

(ii) A proceeding or investigation from which such proceeding or investigation directly resulted was pending during the former employee's service; or

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), came to or would likely have come to the former employee's attention in the course of the employee's duties, and the employee left the Commission within the previous three years.

NOTE: This requirement applies even to a proceeding or investigation that had not yet been initiated formally when the former employee terminated employment, if the employee had learned nonpublic information relating to the subsequently initiated proceeding or investigation.

(3) *Exceptions.* (i) Paragraphs (b) (1) and (2) of this section do not apply to:

(A) Making a pro se filing of any kind;

(B) Submitting a request or appeal under the Freedom of Information Act, the Privacy Act, or the Government in the Sunshine Act;

(C) Testifying under oath (except that a former employee who is subject to the restrictions contained in paragraph (b)(1)(i) of this section with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any person other than the United States in that same matter);

(D) Submitting a statement required to be made under penalty of perjury; or

(E) Appearing on behalf of the United States.

(ii) With the exception of subparagraph (b)(1)(iv), paragraphs (b) (1) and (2) of this section do not apply to participating in a Commission rulemaking proceeding, including submitting comments on a matter on which the Commission has invited public comment.

(iii) Paragraph (b)(1)(iv) of this section does not apply to submitting a statement based on the former employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided by law or by § 4.5 for witnesses.

(iv) Paragraph (b)(2) of this section does not apply to filing a premerger notification form or participating in subsequent events concerning compliance or noncompliance with Section 7A of the Clayton Act, 15 U.S.C. 18a, or any regulation issued under that section.

(4) *Request contents.* Clearance requests filed pursuant to § 4.1(b)(2) shall contain:

(i) The name and matter number (if known) of the proceeding or investigation in question;

(ii) A description of the contemplated participation;

(iii) The name of the Commission office(s) or division(s) in which the former employee was employed and the position(s) the employee occupied;

(iv) A statement whether, while employed by the Commission, the former employee participated in any proceeding or investigation concerning

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the same company, individual, or industry currently involved in the matter in question;

(v) A certification that while employed by the Commission, the employee never participated personally and substantially in the same matter or proceeding;

(vi) If the employee's Commission employment terminated within the past two years, a certification that the matter was not pending under the employee's official responsibility during any part of the one year before the employee's termination;

(vii) If the employee's Commission employment terminated within the past three years, either a declaration that nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), never came to the employee's attention, or a description of why the employee believes that such nonpublic documents or information could not confer a present advantage to the employee or to the employee's client in the proceeding or investigation in question; and

(viii) A certification that the employee has read, and understands, both the criminal conflict of interest law on post-employment activities (18 U.S.C. 207) and this Rule in their entirety.

(5) *Definitions.* The following definitions apply for purposes of this section:

(i) *Behind-the-scenes* participation includes any form of professional consultation, assistance, or advice to anyone about the proceeding or investigation in question, whether formal or informal, oral or written, direct or indirect.

(ii) *Communicate to or appear before* means making any oral or written communication to, or any formal or informal appearance before, the Commission or any of its members or employees on behalf of any person (except the United States) with the intent to influence.

(iii) *Directly resulted from* means that the proceeding or investigation in question emanated from an earlier phase of the same proceeding or investigation or from a directly linked, antecedent investigation. The existence of some attenuated connection between a proceeding or investigation that was

pending during the requester's tenure and the proceeding or investigation in question does not constitute a direct result.

(iv) *Pending under the employee's official responsibility* means that the former employee had the direct administrative or operating authority to approve, disapprove, or otherwise direct official actions in the proceeding or investigation, irrespective of whether the employee's authority was intermediate or final, and whether it was exercisable alone or only in conjunction with others.

(v) *Personal and substantial participation.* A former employee participated in the proceeding or investigation personally if the employee either participated directly or directed a subordinate in doing so. The employee participated substantially if the involvement was significant to the matter or reasonably appeared to be significant. A series of peripheral involvements may be considered insubstantial, while a single act of approving or participating in a critical step may be considered substantial.

(vi) *Present advantage.* Whether exposure to nonpublic information about the proceeding or investigation could confer a present advantage to a former employee will be analyzed and determined on a case-by-case basis. Relevant factors include, *inter alia*, the nature and age of the information, its relation and current importance to the proceeding or investigation in question, and the amount of time that has passed since the employee left the Commission.

(vii) *Proceeding or investigation* shall be interpreted broadly and includes an adjudicative or other proceeding; the consideration of an application; a request for a ruling or other determination; a contract; a claim; a controversy; an investigation; or an interpretive ruling.

(6) *Advice as to whether clearance request is required.* A former employee may ask the General Counsel, either orally or in writing, whether the employee is required to file a request for clearance to participate in a Commission matter pursuant to paragraph (b)(2) of this section. The General

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Counsel, or the General Counsel's designee, will make any such determination within three business days.

(7) *Deadline for determining clearance requests.* By the close of the tenth business day after the date on which the clearance request is filed, the General Counsel, or the General Counsel's designee, will notify the requester either that:

(i) The request for clearance has been granted;

(ii) The General Counsel or the General Counsel's designee has decided to recommend that the Commission prohibit the requester's participation; or

(iii) The General Counsel or the General Counsel's designee is, for good cause, extending the period for reaching a determination on the request by up to an additional ten business days.

(8) *Participation of partners or associates of former employees.* (i) If a former employee is prohibited from participating in a proceeding or investigation by virtue of having worked on the matter personally and substantially while a Commission employee, no partner or legal or business associate of that individual may participate except after filing with the Secretary of the Commission an affidavit attesting that:

(A) The former employee will not participate in the proceeding or investigation in any way, directly or indirectly (and describing how the former employee will be screened from participating);

(B) The former employee will not share in any fees resulting from the participation;

(C) Everyone who intends to participate is aware of the requirement that the former employee be screened;

(D) The client(s) have been informed; and

(E) The matter was not brought to the participant(s) through the active solicitation of the former employee.

(ii) If the Commission finds that the screening measures being taken are unsatisfactory or that the matter was brought to the participant(s) through the active solicitation of the former employee, the Commission will notify the participant(s) to cease the representation immediately.

(9) *Effect on other standards.* The restrictions and procedures in this sec-

tion are intended to apply in lieu of restrictions and procedures that may be adopted by any state or jurisdiction, insofar as such restrictions and procedures apply to appearances or participation in Commission proceedings or investigations. Nothing in this section supersedes other standards of conduct applicable under paragraph (e) of this section. Requests for advice about this section, or about any matter related to other applicable rules and standards of ethical conduct, shall be directed to the Office of the General Counsel.

(c) *Public disclosure.* Any request for clearance filed by a former member or employee pursuant to this section, as well as any written response, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter. Information identifying the subject of a nonpublic Commission investigation will be redacted from any request for clearance or other document before it is placed on the public record.

(d) *Notice of appearance.* Any attorney desiring to appear before the Commission or an Administrative Law Judge on behalf of a person or party shall file with the Secretary of the Commission a written notice of appearance, stating the basis for eligibility under this section and including the attorney's jurisdiction of admission/qualification, attorney identification number, if applicable, and a statement by the appearing attorney attesting to his/her good standing within the legal profession. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

(e) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice

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before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

[32 FR 8456, June 13, 1967, as amended at 40 FR 15235, Apr. 4, 1975; 41 FR 16453, Apr. 19, 1976; 46 FR 26295, May 12, 1981; 48 FR 44767, Sept. 30, 1983; 50 FR 50781, Dec. 12, 1985; 50 FR 53306, Dec. 31, 1985; 56 FR 44139, Sept. 27, 1991; 58 FR 40737, July 30, 1993; 63 FR 15758, Apr. 1, 1998; 64 FR 14830, Mar. 29, 1999; 66 FR 13645, Mar. 7, 2001; 66 FR 64143, Dec. 12, 2001]

### § 4.2 Requirements as to form, and filing of documents other than correspondence.

(a) *Filing.* (1) All paper and electronic documents filed with the Commission or with an Administrative Law Judge pursuant to part 0, part 1, part 2, or part 3 of this chapter shall be filed with the Secretary of the Commission, except that:

(i) Documents produced in response to compulsory process issued pursuant to part 2 or part 3 of this chapter shall instead be produced to the custodian, deputy custodian, or other person prescribed therein, and in the manner prescribed therein; and

(ii) Comments filed in response to a Commission request for public comment shall instead be filed in the manner prescribed in the FEDERAL REGISTER document or other Commission document containing the request for such comment.

(2) All paper and electronic documents filed with the Commission pursuant to parts 4–999 of this chapter shall be filed with the Secretary of the Commission, except as otherwise provided in such part.

(b) *Title and public or nonpublic status.* All paper and electronic documents filed with the Commission or with an Administrative Law Judge pursuant to any part of this chapter shall clearly show the file or docket number and title of the action in connection with which they are filed. Every page of each such document shall be clearly and accurately labeled “Public”, “*In Camera*” or “Confidential”.

(c) *Paper and electronic copies of and service of filings before the Commission or*

*an Administrative Law Judge in adjudicative proceedings.* (1) Each document filed before the Commission or an Administrative Law Judge in an adjudicative proceeding, except documents covered by § 4.2(a)(1)(i), shall be filed with the Secretary of the Commission; shall comply with the requirements of § 4.2(b); and shall include a paper original (in 12-point font with 1-inch margins), one paper copy (if before the Administrative Law Judge) or twelve (12) paper copies (if before the Commission), and an electronic copy in Adobe portable document format or such other format as the Secretary may direct.

(2) If the document is labeled “*In Camera*” or “Confidential”, it must include as an attachment either a motion requesting in camera or other confidential treatment, in the form prescribed by § 3.45, or a copy of a Commission, Administrative Law Judge, or federal court order granting such treatment. The document must also include as a separate attachment a set of only those pages of the document on which the in camera or otherwise confidential material appears and comply with all other requirements of § 3.45 and any other applicable rules governing in camera treatment.

(3)(i) If the document is labeled “Public”, the electronic copy shall be filed as the Secretary shall direct, or through such electronic system as the Commission may provide.

(ii) If the document is labeled “*In Camera*” or “Confidential”, the electronic copy shall be submitted on a compact disc (CD) or digital video disc (DVD) so labeled, which shall be physically attached to the paper original, and shall not be transmitted to the Commission by e-mail or any other electronic system.

(iii) Each electronic copy filed pursuant to § 4.2(c)(1) shall include a certification by the filing party that the copy is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

(4) Sensitive personal information, as defined in § 3.45(b), shall not be included in, and must be redacted or omitted from, filings where the filing

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party determines that such information is not relevant or otherwise necessary for the conduct of the proceeding.

(5) A paper copy of each document filed in accordance with this section in an adjudicative proceeding shall be served by the party filing the document or person acting for that party on all other parties pursuant to § 4.4, at or before the time the original is filed.

(d) *Paper and electronic copies of other documents filed with the Commission.* Each paper or electronic document filed with the Commission, and not covered by § 4.2(a)(1)(i), § 4.2(a)(1)(ii), or § 4.2(c), shall be filed with the Secretary of the Commission, and shall be clearly and accurately labeled as required by § 4.2(b).

(1) Each such paper document shall be signed, and shall be accompanied by an electronic copy on a compact disc (CD) or digital video disc (DVD) in Adobe portable document format or such other format as the Secretary shall direct.

(2) Each such document filed pursuant to § 2.7(d), § 2.7(f), § 2.41(f), or § 2.51 shall also include twelve (12) paper copies of the signed paper original.

(3) Each such document labeled “Public” may be placed on the public record of the Commission at the time it is filed.

(4) If such a document is labeled “Confidential”, and it is filed pursuant to § 2.7(d), § 2.7(f), § 2.41(f), or § 2.51, it will be rejected for filing pursuant to § 4.2(g), and will not stay compliance with any applicable obligation imposed by the Commission or the Commission staff, unless the filer simultaneously files:

(i) An explicit request for confidential treatment that includes the factual and legal basis for the request, identifies the specific portions of the document to be withheld from the public record, provides the name and address of the person(s) who should be notified in the event the Commission determines to disclose some or all of the material labeled “Confidential”, and otherwise conforms to the requirements of § 4.9(c); and

(ii) A redacted public version of the document that is clearly labeled “Public”.

(e) *Form.* (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceeding shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by § 3.52(e).

(f) *Signature.* (1) The original of each document filed shall have a hand signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a document constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; and that to the best of his or her knowledge, information, and belief, it complies with the rules in this part. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

(g) *Authority to reject documents for filing.* The Secretary of the Commission may reject a document for filing that fails to comply with the Commission’s rules. In cases of extreme hardship, the Secretary may excuse compliance with a rule regarding the filing of documents if the Secretary determines that the non-compliance would not interfere with the functions of the Commission.

[74 FR 1835, Jan. 13, 2009, as amended at 74 FR 20209, May 1, 2009; 76 FR 52253, Aug. 22, 2011]

### § 4.3 Time.

(a) *Computation.* Computation of any period of time prescribed or allowed by the rules in this chapter, by order of the Commission or an Administrative

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Law Judge, or by any applicable statute, shall begin with the first business day following that on which the act, event, or development initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national holiday, or other day on which the office of the Commission is closed, the period shall run until the end of the next following business day. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, is seven (7) days or less, each of the Saturdays, Sundays, and such holidays shall be excluded from the computation. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, exceeds seven (7) days, each of the Saturdays, Sundays, and such holidays shall be included in the computation.

(b) *Extensions.* For good cause shown, the Administrative Law Judge may, in any proceeding before him or her: (1) Extend any time limit prescribed or allowed by order of the Administrative Law Judge or the Commission (if the Commission order expressly authorizes the Administrative Law Judge to extend time periods); or (2) extend any time limit prescribed by the rules in this chapter, except those governing motions directed to the Commission, interlocutory appeals and initial decisions and deadlines that the rules expressly authorize only the Commission to extend. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge, provided, however, that in a proceeding pending before an Administrative Law Judge, any motion on which he or she may properly rule shall be made to the Administrative Law Judge. Notwithstanding the above, where a motion to extend is made after the expiration of the specified period, the motion may be considered where the untimely filing was the result of excusable neglect.

(c) *Additional time after service by mail.* Whenever a party in an adjudicative proceeding under part 3 of the rules is required or permitted to do an act within a prescribed period after service

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of a paper upon it and the paper is served by first-class mail pursuant to § 4.4(a)(3) or § 4.4(b), 3 days shall be added to the prescribed period.

(d) *Date of filing.* Documents must be received in the office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day.

[32 FR 8456, June 13, 1967, as amended at 42 FR 30150, June 13, 1977; 50 FR 28097, July 10, 1985; 50 FR 53306, Dec. 31, 1985; 66 FR 17633, Apr. 3, 2001; 74 FR 1836, Jan. 13, 2009]

#### § 4.4 Service.

(a) *By the Commission.* (1) Service of complaints, initial decisions, final orders and other processes of the Commission under 15 U.S.C. 45 may be effected as follows:

(i) *By registered or certified mail.* A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his, her or its residence or principal office or place of business, registered or certified, and mailed; service under this provision is complete upon delivery of the document by the Post Office; or

(ii) *By delivery to an individual.* A copy thereof may be delivered to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation or unincorporated association to be served; service under this provision is complete upon delivery as specified herein; or

(iii) *By delivery to an address.* A copy thereof may be left at the principal office or place of business of the person, partnership, corporation, or unincorporated association, or it may be left at the residence of the person or of a member of the partnership or of an executive officer or director of the corporation, or unincorporated association to be served; service under this provision is complete upon delivery as specified herein.

(2) All other orders and notices, including subpoenas, orders requiring access, orders to file annual and special reports, and notices of default, may be

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served by any method reasonably certain to inform the affected person, partnership, corporation or unincorporated association, including any method specified in paragraph (a)(1), except that civil investigative demands may only be served in the manner provided by section 20(c)(7) of the FTC Act (in the case of service on a partnership, corporation, association, or other legal entity) or section 20(c)(8) of the FTC Act (in the case of a natural person). Service under this provision is complete upon delivery by the Post Office or upon personal delivery.

(3) All documents served in adjudicative proceedings under the Commission's Rules of Practice, 16 CFR part 3, other than complaints and initial, interlocutory, and final decisions and orders, may be served by personal delivery (including delivery by courier), or by first-class mail, and shall be deemed served on the day of personal delivery or the day of mailing.

(4) When a party has appeared in a proceeding by an attorney, service on that individual of any document pertaining to the proceeding other than a complaint shall be deemed service upon the party. However, service of those documents specified in paragraph (a)(1) of this section shall first be attempted in accordance with the provision of paragraphs (a)(1) (i), (ii), and (iii) of this section.

(b) *By other parties.* Service of documents by parties other than the Commission shall be by delivering copies thereof as follows: Upon the Commission, by personal delivery (including delivery by courier) or delivery by first-class mail to the Office of the Secretary of the Commission and, in adjudicative proceedings under the Commission's Rules of Practice, 16 CFR part 3, to the lead complaint counsel, the Assistant Director in the Bureau of Competition, the Associate Director in the Bureau of Consumer Protection, or the Director of the Regional Office of complaint counsel, with a copy to the Administrative Law Judge. Upon a party other than the Commission or Commission counsel, service shall be by personal delivery (including delivery by courier) or delivery by first-class mail with a copy to the Administrative Law Judge. If the party is an

individual or partnership, delivery shall be to such individual or a member of the partnership; if a corporation or unincorporated association, to an officer or agent authorized to accept service of process therefor. Personal service includes handling the document to be served to the individual, partner, officer, or agent; leaving it at his or her office with a person in charge thereof; or, if there is no one in charge or if the office is closed or if the party has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Documents served in adjudicative proceedings under part 3 of the Commission's Rules of Practice shall be deemed served on the day of personal service or the day of mailing. All other documents shall be deemed served on the day of personal service or on the day of delivery by the Post Office.

(c) *Proof of service.* In an adjudicative proceeding under the Commission's Rules of Practice, 16 CFR part 3, papers presented for filing shall contain proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service must appear on or be affixed to the papers filed.

[50 FR 28097, July 10, 1985, as amended at 66 FR 17633, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

### § 4.5 Fees.

(a) *Deponents and witnesses.* Any person compelled to appear in person in response to subpoena shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) *Presiding officers.* Officers before whom depositions are taken shall be entitled to the same fees as are paid for like services in the courts of the United States.

(c) *Responsibility.* The fees and mileage referred to in this section shall be paid by the party at whose instance deponents or witnesses appear.

[32 FR 8456, June 13, 1967]

**§ 4.6 Cooperation with other agencies.**

It is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.

[32 FR 8456, June 13, 1967]

**§ 4.7 Ex parte communications.**

(a) *Definitions.* For purposes of this section, *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding.

(b) *Prohibited ex parte communications.* While a proceeding is in adjudicative status within the Commission, except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No person not employed by the Commission, and no employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, shall make or knowingly cause to be made to any member of the Commission, or to the Administrative Law Judge, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, an *ex parte* communication relevant to the merits of that or a factually related proceeding; and

(2) No member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, shall make or knowingly cause to be made to any person not employed by the Commission, or to any employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, an *ex parte* communication relevant to the merits of that or a factually related proceeding.

(c) *Procedures.* A Commissioner, the Administrative Law Judge or any other employee who is or who may reasonably be expected to be involved in the decisional process who receives or who make or knowingly causes to be made, a communication prohibited by

paragraph (b) of this section shall promptly provide to the Secretary of the Commission:

(1) All such written communications;

(2) Memoranda stating the substance of and circumstances of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c) (1) and (2) of this section. The Secretary shall make relevant portions of any such materials part of the public record of the Commission, pursuant to § 4.9, and place them in the docket binder of the proceeding to which it pertains, but they will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence in the proceeding. The Secretary shall also send copies of the materials to or otherwise notify all parties to the proceeding.

(d) *Sanctions.* (1) Upon receipt of an *ex parte* communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Commission, Administrative Law Judge, or other employee presiding over the proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation. The Commission may take such action as it considers appropriate, including but not limited to, action under § 4.1(e)(2) and 5 U.S.C. 556(d).

(2) A person, not a party to the proceeding who knowingly makes or causes to be made an *ex parte* communication prohibited by paragraph (b) of this section shall be subject to all sanctions provided herein if he subsequently becomes a party to the proceeding.

(e) The prohibitions of this section shall apply in an adjudicative proceeding from the time the Commission votes to issue a complaint pursuant to § 3.11, to conduct adjudicative hearings pursuant to § 3.13, or to issue an order to show cause pursuant to § 3.72(b), or from the time an order by a U.S. court

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of appeals remanding a Commission decision and order for further proceedings becomes effective, until the time the Commission votes to enter its decision in the proceeding and the time permitted by § 3.55 to seek reconsideration of that decision has elapsed. For purposes of this section, an order of remand by a U.S. court of appeals shall be deemed to become effective when the Commission determines not to file a petition for a writ of *certiorari*, or when the time for filing such a petition has expired without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Commission decision is filed pursuant to § 3.55, the provisions of this section shall apply until the time the Commission votes to enter an order disposing of the petition. In addition, the prohibitions of this section shall apply with respect to communications concerning an application for stay filed with the Commission pursuant to § 3.56 from the time that the application is filed until its disposition.

(f) The prohibitions of paragraph (b) of this section do not apply to a communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation, the issuance of a complaint, or the initiation of a rulemaking or other proceeding, whether or not it involves a party already in an adjudicative proceeding; preparations for judicial review of a Commission order; a proceeding outside the scope of § 3.2, including a matter in state or federal court or before another governmental agency; a nonadjudicative function of the Commission, including but not limited to an obligation under § 4.11 or a communication with Congress; or the disposition of a consent settlement under § 3.25 concerning some or all of the charges involved in a complaint and executed by some or all respondents. The Commission, at its discretion and under such restrictions as it may deem appropriate, may disclose to the public or to respondent(s) in a pending adjudicative proceeding a communication made exempt by this paragraph from the prohibitions of paragraph (b) of this section, however, when the

Commission determines that the interests of justice would be served by the disclosure. The prohibitions of paragraph (b) of this section also do not apply to a communication between any member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process, and any employee who has been directed by the Commission or requested by an individual Commissioner or Administrative Law Judge to assist in the decision of the adjudicative proceeding. Such employee shall not, however, have performed an investigative or prosecuting function in that or a factually related proceeding.

[42 FR 43974, Sept. 1, 1977, as amended at 44 FR 40637, July 12, 1979; 46 FR 32435, June 23, 1981; 50 FR 53306, Dec. 31, 1985; 51 FR 36802, Oct. 16, 1986; 57 FR 10805, Mar. 31, 1992; 60 FR 37748, July 21, 1995; 60 FR 67325, Dec. 29, 1995]

### § 4.8 Costs for obtaining Commission records.

(a) *Definitions.* For the purpose of this section:

(1) The term *search* includes all time spent looking, manually or by automated means, for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents.

(2) The term *duplication* refers to the process of making a copy of a document in order to respond to a request for Commission records.

(3) The term *review* refers to the examination of documents located in response to a request to determine whether any portion of such documents may be withheld, and the reduction or other processing of documents for disclosure. Review does not include time spent resolving general legal or policy issues regarding the release of the document.

(4) The term *direct costs* means expenditures that the Commission actually incurs in processing requests. Not included in direct costs are overhead expenses such as costs of document review facilities or the costs of heating or lighting such a facility or other facilities in which records are stored. The direct costs of specific services are set forth in § 4.8(b)(6).

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(b) *Fees.* User fees pursuant to 31 U.S.C. 483(a) and 5 U.S.C. 552(a) shall be charged according to this paragraph.

(1) *Commercial use requesters.* Commercial use requesters will be charged for the direct costs to search for, review, and duplicate documents. A commercial use requester is a requester who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(2) *Educational requesters, non-commercial scientific institution requesters, and representative of the news media.* Requesters in these categories will be charged for the direct costs to duplicate documents, excluding charges for the first 100 pages. An *educational institution* is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. A *non-commercial scientific institution* is an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (b)(1) of this section, and that is operated solely to

conduct scientific research the results of which are not intended to promote any particular product or industry. A *representative of the news media* is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. *News* means information that is about current events or that would be of current interest to the public.

(3) *Other requesters.* Other requesters will be charged for the direct costs to search for and duplicate documents, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge.

(4) *Waiver of small charges.* Notwithstanding the provisions of paragraphs (b)(1), (2), and (3) of this section, charges will be waived if the total chargeable fees for a request do not exceed \$14.00.

(5) *Materials available without charge.* These provisions do not apply to recent Commission decisions and other materials that may be made available to all requesters without charge while supplies last.

(6) *Schedule of direct costs.* The following uniform schedule of fees applies to records held by all constituent units of the Commission:

### Paper Fees:

Paper copy (up to 8.5"×14").	
Reproduced by Commission .....	\$0.14 per page.
Reproduced by Requester .....	0.05 per page.

### Microfiche Fees:

Film Copy—Paper to 16mm film .....	0.04 per frame.
Fiche Copy—Paper to 105mm fiche .....	0.08 per frame.
Film Copy—Duplication of existing 100 ft. roll of 16mm film .....	9.50 per roll.
Fiche Copy—Duplication of existing 105mm fiche .....	0.26 per fiche.
Paper Copy—Converting existing 16mm film to paper (Conversion by Commission Staff).	0.26 per page.
Paper Copy—Converting existing 105mm fiche to paper (Conversion by Commission Staff).	0.23 per page.
Film Cassettes .....	2.00 per cassette.

### Electronic Services:

Converting paper into electronic format (scanning) .....	2.50 per page.
Computer programming .....	8.00 per qtr. hour.

### Other Fees:

Computer Tape .....	18.50 each.
Certification .....	10.35 each.
Express Mail .....	3.50 for first pound and 3.67 for each additional pound (up to \$15.00).

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### Search and Review Fees

Agency staff is divided into three categories: clerical, attorney/economist, and other professional. Fees for search and review are assessed on a quarter-hourly basis, and are determined by identifying the category into which the staff member(s) conducting the search or review belong(s), determining the average quarter-hourly wages of all staff members within that category, and adding 16 percent to reflect the cost of additional benefits accorded to government employees. The exact fees are calculated and announced periodically and are available from the Consumer Response Center, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580; (202) 326-2222.

(c) *Information to determine fees.* Each request for records shall set forth whether the request is made for other than commercial purposes and whether the requester is an educational institution, a noncommercial scientific institution, or a representative of the news media. The deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, will use this information, any additional information provided by the requester, and any other relevant information to determine the appropriate fee category in which to place the requester.

(d) *Agreement to pay fees.* (1) Each request that does not contain an application for a fee waiver shall specifically indicate the requester's willingness either:

(i) To pay, in accordance with § 4.8(b) of these rules, whatever fees may be charged for processing the request; or

(ii) A willingness to pay such fees up to a specified amount.

(2) Each request that contains an application for a fee waiver must specifically indicate:

(i) The requester's willingness to pay, in accordance with § 4.8(b) of the rules, whatever fees may be charged for processing the request;

(ii) The requester's willingness to pay fees up to a specified amount; or

(iii) That the requester is not willing to pay fees if the waiver is not granted.

(3) If the agreement required by this section is absent, and if the estimated

fees exceed \$25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees.

(e) *Public interest fee waivers*—(1) *Procedures.* A requester may apply for a waiver of fees. The requester shall explain why a waiver is appropriate under the standards set forth in this paragraph. The application shall also include a statement, as provided by paragraph (d) of this section, of whether the requester agrees to pay costs if the waiver is denied. The deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, will rule on applications for fee waivers.

(2) *Standards.* (i) The first requirement for a fee waiver is that disclosure will likely contribute significantly to public understanding of the operations or activities of the government. This requirement shall be met if:

(A) The subject matter of the requested information concerns the operations or activities of the Federal government;

(B) The disclosure is likely to contribute to an understanding of these operations or activities;

(C) The understanding to which disclosure is likely to contribute is the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons; and

(D) The likely contribution to public understanding will be significant.

(ii) The second requirement for a fee waiver is that the request not be primarily in the commercial interest of the requester. Satisfaction of this requirement shall be determined by considering:

(A) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(B) If so, whether the public interest in disclosure is outweighed by the identified commercial interest of the requester so as to render the disclosure primarily in the requester's commercial interest.

(f) *Unsuccessful searches.* Charges may be assessed for search time even if the agency fails to locate any responsive records or if it locates only records

that are determined to be exempt from disclosure.

(g) *Aggregating requests.* If the deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, reasonably believes that a requester, or a group of requesters acting in concert, is attempting to evade an assessment of fees by dividing a single request into a series of smaller requests, the requests may be aggregated and fees charged accordingly.

(h) *Advance payment.* If the deciding official (as designated by the General Counsel) initially, or the General Counsel on appeal, estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, or if the requester has previously failed to pay a fee within 30 days of the date of billing, the requester may be required to pay some or all of the total estimated charge in advance. Further, the requester may be required to pay all unpaid bills, including accrued interest, prior to processing the request.

(i) *Means of payment.* Payment shall be made by check or money order payable to the Treasury of the United States.

(j) *Interest charges.* The Commission will begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will accrue from the date of the billing, and will be calculated at the rate prescribed in 31 U.S.C. 3717.

(k) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365)* The Commission may pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act, Public Law 97–365, including disclosure to consumer reporting agencies and use of collection agencies.

[57 FR 10806, Mar. 31, 1992, as amended at 63 FR 45646, Aug. 26, 1998; 64 FR 3012, Jan. 20, 1999; 66 FR 64144, Dec. 12, 2001]

#### § 4.9 The public record.

(a) *General.* (1) Materials on the public record of the Commission are available for public inspection and copying either routinely or upon request.

(2) Materials that are exempt from mandatory public disclosure, or are otherwise not available from the Commission's public record, may be made

available for inspection and copying only upon request under the procedures set forth in § 4.11 of this part, or as provided in §§ 4.10 (d) through (g), 4.13, and 4.15(b)(3) of this part, or by the Commission.

(3) *Location.* All of the public records of the Commission are available for inspection at the principal office of the Commission on each business day from 9 a.m. to 5 p.m., and copies of some of those records are available at the regional offices on each business day from 8:30 a.m. to 5 p.m. Copies of records that the Commission is required to make available to the public electronically, pursuant to 5 U.S.C. 552(a)(2), may be obtained in that format from the Commission's Web site on the Internet, [www.ftc.gov](http://www.ftc.gov).

(4) *Copying of public records—(i) Procedures.* Reasonable facilities for copying public records are provided at each office of the Commission. Subject to appropriate limitations and the availability of facilities, any person may copy public records available for inspection at each of those offices. Further, the agency will provide copies to any person upon request. Written requests for copies of public records shall be addressed to the Supervisor, Consumer Response Center, and shall specify as clearly and accurately as reasonably possible the records desired. For records that cannot be specified with complete clarity and particularity, requesters shall provide descriptions sufficient to enable qualified Commission personnel to locate the records sought. In any instance, the Commission, the Supervisor of the Consumer Response Center, the General Counsel, the deciding official (as designated by the General Counsel), or the official in charge of each office may prohibit the use of Commission facilities to produce more than one copy of any public record, and may refuse to permit the use of such facilities for copying records that have been published or are publicly available at places other than the offices of the Commission.

(ii) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the

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information needed to determine fees, as provided by § 4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by § 4.8(d). Requests may also include an application for a fee waiver, as provided by § 4.8(e). Advance payment may be required, as provided by § 4.8(h).

(iii) *Records for sale at another government agency.* If requested materials are available for sale at another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(b) *Categories.* Except to the extent material is confidential, as provided in paragraph (c) of this section, the public record of the Commission includes, but is not necessarily limited to:

(1) *Commission Organization and Procedures (16 CFR part 0 and §§ 4.14 through 4.15, 4.17).* (i) A current index of opinions, orders, statements of policy and interpretations, administrative staff manuals, general instructions and other public records of the Commission;

(ii) A current record of the final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting;

(iii) Descriptions of the Commission's organization, including descriptions of where, from whom, and how the public may secure information, submit documents or requests, and obtain copies of orders, decisions and other materials;

(iv) Statements of the Commission's general procedures and policies and interpretations, its nonadjudicative procedures, its rules of practice for adjudicative proceedings, and its miscellaneous rules, including descriptions of the nature and requirements of all formal and informal procedures available, and

(v) Reprints of the principal laws under which the Commission exercises enforcement or administrative responsibilities.

(2) *Industry Guidance (16 CFR 1.1–1.6).*

(i) Any advice, advisory opinion or response given and required to be made public under §§ 1.4 and 2.41 (d) or (f) of this chapter (whether by the Commis-

sion or the staff), together with a statement of supporting reasons;

(ii) Industry guides, digests of advisory opinions and compliance advice believed to be of interest to the public generally and other administrative interpretations;

(iii) Transcripts of hearings in all industry guide proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings; and

(iv) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of industry guides.

(3) *Rulemaking (16 CFR 1.7 through 1.26).* (i) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of rules or regulations within the scope of §§ 1.7 and 1.21 of this chapter, and petitions for exemptions;

(ii) Notices and advance notices of proposed rulemaking and rules and orders issued in rulemaking proceedings; and

(iii) Transcripts of hearings of all rulemaking proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings.

(4) *Investigations (16 CFR 2.7).* (i) Petitions to limit or quash compulsory process and the rulings thereon, requests for review by the full Commission of those rulings, and Commission rulings on such requests; and

(ii) Closing letters in initial phase and full phase investigations.

(5) *Adjudicative proceedings, stay applications, requests to reopen, and litigated orders. (16 CFR 2.51, 3.1 through 3.24, 3.31 through 3.56, 3.71 through 3.72, 4.7)*—Except for transcripts of matters heard *in camera* pursuant to § 3.45 and material filed *in camera* pursuant to §§ 3.22, 3.24, 3.45, 3.46, 3.51 and 3.52,

(i) The versions of pleadings and transcripts of prehearing conferences to the extent made available under § 3.21(e), motions, certifications, orders, and the transcripts of hearings (including public conferences), testimony, oral arguments, and other material made a part thereof, and exhibits and material received in evidence or made a part of the public record in adjudicative proceedings;

(ii) Initial decisions of administrative law judges;

(iii) Orders and opinions in interlocutory matters;

(iv) Final orders and opinions in adjudications, and rulings on stay applications, including separate statements of Commissioners;

(v) Petitions for reconsideration, and answers thereto, filed pursuant to §3.55;

(vi) Applications for stay, answers thereto, and replies, filed pursuant to §3.56;

(vii) Petitions, applications, pleadings, briefs, and other records filed by the Commission with the courts in connection with adjudicative, injunctive, enforcement, compliance, and condemnation proceedings, and in connection with judicial review of Commission actions, and opinions and orders of the courts in disposition thereof;

(viii) Records of *ex parte* communications in adjudicative proceedings and stay applications;

(ix) Petitions to reopen proceedings and orders to determine whether orders should be altered, modified, or set aside in accordance with §2.51; and

(x) Decisions reopening proceedings, and orders to show cause under §3.72.

(6) *Consent agreements* (16 CFR 2.31 through 2.34, 3.25). (i) Agreements containing orders, after acceptance by the Commission pursuant to §§2.34 and 3.25(f) of this chapter;

(ii) Comments and other materials filed or placed on the public record under §§2.34 and 3.25(f) concerning proposed consent agreements and related orders; and

(iii) Decisions and orders issued and served under §§2.34 and 3.25(f), including separate statements of Commissioners.

(7) *Compliance/enforcement* (16 CFR 2.33, 2.41). (i) Reports of compliance filed pursuant to the rules in this chapter or pursuant to a provision in a Commission order and supplemental materials filed in connection with these reports, except for reports of compliance, and supplemental materials filed in connection with Commission orders requiring divestitures or establishment of business enterprises of facilities, which are confidential until the last divestiture or establishment of

a business enterprise or facility, as required by a particular order, has been finally approved by the Commission, and staff letters to respondents advising them that their compliance reports do not warrant any further action. At the time each such report is submitted the filing party may request confidential treatment in accordance with paragraph (c) of this section and the General Counsel or the General Counsel's designee will pass upon such request in accordance with that paragraph;

(ii) Materials required to be made public under 16 CFR 2.41(f) in connection with applications for approval of proposed divestitures, acquisitions or similar transactions subject to Commission review under outstanding orders.

(8) *Access to documents and meetings* (16 CFR 4.8, 4.11, 4.13, 4.15). (i) Letters requesting access to Commission records pursuant to §4.11(a) of this chapter and the Freedom of Information Act, 5 U.S.C. 552, and letters granting or denying such requests (not including access requests and answers thereto from the Congress or other government agencies);

(ii) Announcements of Commission meetings as required under the Sunshine Act, 5 U.S.C. 552b, including records of the votes to close such meetings;

(iii) Summaries or other explanatory materials relating to matters to be considered at open meetings made available pursuant to §4.15(b)(3)

(iv) Commission minutes of open meetings, and, to the extent they are not exempt from mandatory public disclosure under the Sunshine Act or the Freedom of Information Act, portions of minutes or transcripts of closed meetings; and

(v) A guide for requesting records or information from the Commission, including an index of all major information systems, a description of major information and record locator systems maintained by the Commission, and a handbook for obtaining various types and categories of public information.

(9) *Standards of conduct* (16 CFR 5.5 through 5.6, 5.10 through 5.26, 5.31, 5.57 through 5.68). (i) Memoranda to staff

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elaborating or clarifying standards described in administrative staff manuals and part 5 of this subchapter.

(10) *Miscellaneous (press releases, clearance requests, reports filed by or with the Commission, continuing guaranties, registered identification numbers).* (i) Releases by the Commission's Office of Public Affairs supplying information concerning the activities of the Commission;

(ii) Applications under § 4.1(b)(2) of this chapter for clearance or authorization to appear or participate in a proceeding or investigation and of the Commission's responses thereto;

(iii) Continuing guaranties filed under the Wool, Fur, and Textile Acts;

(iv) Published reports by the staff or by the Commission on economic surveys and investigations of general interest;

(v) Filings by the Commission or by the staff in connection with proceedings before other federal agencies or state or local government bodies;

(vi) Registration statements and annual reports filed with the Commission by export trade associations, and bulletins, pamphlets, and reports with respect to such associations released by the Commission;

(vii) The identities of holders of registered identification numbers issued by the Commission pursuant to § 1.32 of this chapter;

(viii) The Commission's annual report submitted after the end of each fiscal year, summarizing its work during the year (available for inspection at each of the offices of the Commission with copies obtainable from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402) and any other annual reports made to Congress on activities of the Commission as required by law;

(ix) Records, as determined by the General Counsel or his or her designee, that have been released in response to a request made under the Freedom of Information Act, 5 U.S.C. 552, and which, because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records, except where some or all of those records would be exempt from

disclosure under 5 U.S.C. 552 if requested by another party;

(x) A general index of the records referred to under paragraph (b)(10)(ix) of this section;

(xi) Grants of early termination of waiting periods published in accordance with the Hart-Scott-Rodino premerger notification provisions of the Clayton Act, 15 U.S.C. 18a(b)(2);

(xii) Reports on appliance energy consumption or efficiency filed with the Commission pursuant to § 305.8 of this chapter;

(xiii) Annual filings by professional boxing sanctioning organizations as required by the Muhammed Ali Boxing Reform Act, 15 U.S.C. 6301 note, 6307a-6307h;

(xiv) Other documents that the Commission has determined to place on the public record; and

(xv) Every amendment, revision, substitute, or repeal of any of the foregoing items listed in § 4.9(b)(1) through (10) of this section.

(c) *Confidentiality and in camera material.* (1) Persons submitting material to the Commission described in this section may designate that material or portions of it confidential and request that it be withheld from the public record. All requests for confidential treatment shall be supported by a showing of justification in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority. The General Counsel or the General Counsel's designee will act upon such request with due regard for legal constraints and the public interest. No such material or portions of material (including documents generated by the Commission or its staff containing or reflecting such material or portions of material) will be placed on the public record until the General Counsel or the General Counsel's designee has ruled on the request for confidential treatment and provided any prior notice to the submitter required by law.

(2) Motions seeking *in camera* treatment of material submitted in connection with a proceeding under part 3 of these rules, except stay applications

under §3.56, shall be filed with the Administrative Law Judge who is presiding over the proceeding. Requests for confidential treatment of material submitted in connection with a stay application shall be made in accordance with §4.9(c)(1).

(3) To the extent that any material or portions of material otherwise falling within paragraph (b) of this section contain information that is not required to be made public under §4.10 of this part, the General Counsel or the General Counsel's designee may determine, with due regard for legal constraints and the public interest, to withhold such materials from the public record.

[50 FR 50779, Dec. 12, 1985, as amended at 57 FR 10805, Mar. 31, 1992; 59 FR 34970, July 8, 1994; 60 FR 37749, July 21, 1995; 63 FR 18820, Apr. 16, 1998; 63 FR 32977, June 17, 1998; 63 FR 45647, Aug. 26, 1998; 64 FR 46269, Aug. 25, 1999; 66 FR 17633, Apr. 3, 2001; 66 FR 64144, Dec. 12, 2001]

#### §4.10 Nonpublic material.

(a) The following records and other material of the Commission are not required to be made public pursuant to 5 U.S.C. 552.

(1) Records, except to the extent required to be disclosed under other laws or regulations, related solely to the internal personnel rules and practices of the Commission. This exemption applies to internal rules or instructions to Commission personnel which must be kept confidential in order to assure effective performance of the functions and activities for which the Commission is responsible and which do not affect members of the public.

(2) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. As provided in section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), this exemption applies to competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.

(3) Interagency or intra-agency memoranda or letters which would not

routinely be available by law to a private party in litigation with the Commission. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other and with officials and employees of other governmental agencies. This exemption includes records of the deliberations of the Commission except for the record of the final votes of each member of the Commission in every agency proceeding. It includes intraagency and interagency reports, memorandums, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Commission or between the Commission and other governmental agencies. It also includes information scheduled for public release, but as to which premature release would be contrary to the public interest;

(4) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy except to the extent such files or materials must be disclosed under other laws or regulations. This exemption applies to personnel and medical records and similar records containing private or personal information concerning any individual which, if disclosed to any person other than the individual concerned or his designated legal representative without his permission in writing, would constitute a clearly unwarranted invasion of personal privacy. Examples of files exempt from disclosure include, but are not limited to:

(i) The personnel records of the Commission;

(ii) Files containing reports, records or other material pertaining to individual cases in which disciplinary or other administrative action has been or may be taken, including records of proceedings pertaining to the conduct or performance of duties by Commission personnel;

(5) Records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information:

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(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(6) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(7) Geological and geophysical information and data, including maps, concerning wells; and

(8) Material, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission:

(i) In an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission; and

(ii) Which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, et seq., or which is provided voluntarily in place of compulsory process in such an investigation. See section 21(f) of the Federal Trade Commission Act.

(9) Material, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. See section 21(b)(3)(C) of the Federal Trade Commission Act.

(10) Such other material of the Commission as may from time to time be designated by the Commission as confidential pursuant to statute or Executive Order. This exempts from disclosure any information that has been designated nonpublic pursuant to criteria and procedures prescribed by Executive Order and that has not been subsequently declassified in accordance with applicable procedures. The exemption also preserves the full force and effect of statutes that restrict public access to specific government records or material.

(11) Material in an investigation or proceeding that involves a possible violation of criminal law, when there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings. When a request is made for records under § 4.11(a), the Commission may treat the records as not subject to the requirements of the Freedom of Information Act.

(b) With respect to information contained in transcripts of Commission meetings, the exemptions contained in paragraph (a) of this section, except for paragraphs (a)(3) and (a)(7) of this section, shall apply; in addition, such information will not be made available if it is likely to have any of the effects described in 5 U.S.C. 552b (c)(5), (c)(9), or (c)(10).

(c) Under section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and

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upon conviction thereof, may be punished by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment not exceeding 1 year, or by fine and imprisonment, in the discretion of the court.

(d) Except as provided in paragraphs (f) or (g) of this section or in § 4.11(b), (c), (d), (i), or (j), no material that is marked or otherwise identified as confidential and that is within the scope of § 4.10(a)(8), and no material within the scope of § 4.10(a)(9) that is not otherwise public, will be made available without the consent of the person who produced the material, to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information. All other Commission records may be made available to a requester under the procedures set forth in § 4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) or (g) of this section or in § 4.11(b), (c), (d), (i), or (j), material not within the scope of § 4.10(a)(8) or § 4.10(a)(9) that is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it is determined that the material is not within the scope of § 4.10(a)(2), and the submitter is provided at least ten days notice of the intent to disclose the material.

(f) Nonpublic material obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of § 4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material obtained by the Commission:

(1) Through compulsory process and protected by section 21(b) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(b) or voluntarily in lieu thereof and designated by the submitter as confidential and protected by section

21(f) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(f), and § 4.10(d) of this part; or

(2) That is designated by the submitter as confidential, and protected by section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(c), and § 4.10(e) of this part; or

(3) That is confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and § 4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. See §§ 1.18(b) and 3.45.

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

(15 U.S.C. 41 et seq.)

[38 FR 1731, Jan. 18, 1973, as amended at 40 FR 7629, Feb. 21, 1975; 40 FR 23278, May 29, 1975; 42 FR 13540, Mar. 11, 1977; 46 FR 26291, May 12, 1981; 49 FR 30166, July 27, 1984; 54 FR 7399, Feb. 21, 1989; 57 FR 10807, Mar. 31, 1992; 60 FR 37749, July 21, 1995; 63 FR 38473, July 17, 1998; 65 FR 67259, Nov. 9, 2000; 66 FR 17633, Apr. 3, 2001; 72 FR 28853, May, 23, 2007]

### § 4.11 Disclosure requests.

(a) *Freedom of Information Act requests*—(1) *Initial requests*—(i) *Form and contents; time of receipt.* (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and addressed as follows: Freedom of Information Act Request, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the request in accordance with paragraph (a)(1)(i)(A) of this section, or the filing of a request for expedited treatment under paragraph (a)(1)(i)(E) of this section, will result in the request (or requests, if expedited treatment has been requested) being treated as received on the date that the processing

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unit in the Office of General Counsel actually receives the request(s).

(C) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by §4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by §4.8(d). Requests may also include an application for a fee waiver, as provided by §4.8(e). An advance payment may be required in appropriate cases as provided by §4.8(h).

(D) *Failure to agree to pay fees.* If a request does not include an agreement to pay fees, and if the requester is notified of the estimated costs pursuant to Rule 4.8(d)(3), the request will be deemed not to have been received until the requester agrees to pay such fees. If a requester declines to pay fees and is not granted a fee waiver, the request will be denied.

(E) *Expedited treatment.* Requests may include an application for expedited treatment. Where such an application is not included with an initial request for access to records under paragraph (a)(1) of this section, the application may be included in any appeal of that request filed under paragraph (a)(2) of this section. Such application, which shall be certified by the requester to be true and correct to the best of such person's knowledge and belief, shall describe the compelling need for expedited treatment, including an explanation as to why a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or, with respect to a request made by a person primarily engaged in disseminating information, an explanation of the urgency to inform the public concerning actual or alleged Federal Government activity. The deciding official (as designated by the General Counsel) will, within 10 calendar days of receipt of a request for expedited treatment, notify the requester, in writing, of the decision to either grant or deny the request for expedited treatment, and, if the request is denied, advise the requester

that this determination may be appealed to the General Counsel.

(F) *Records for sale at another government agency.* If requested materials are available for sale at another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(ii) *Identifiability.* (A) A request for access to Commission records must reasonably describe the records requested to enable Commission personnel to identify and locate them with a reasonable amount of effort. A request should be as specific as possible, and include, where known, information regarding dates, titles, file designations, location, and any other information which may assist the Commission in identifying and locating the records requested.

(B) A denial of a request may state that the description required by paragraph (a)(1)(ii)(A) of this section is insufficient to allow identification and location of the records.

(iii) *Time limit for initial determination.* (A) The deciding official (as designated by the General Counsel) will, within 20 working days of the receipt of a request, either grant or deny, in whole or in part, such request, unless the request has been granted expedited treatment in accordance with this section, in which case the request will be processed as soon as practicable.

(B) Except in exceptional circumstances as provided in paragraph (a)(1)(iii)(C) of this section, the deciding official (as designated by the General Counsel) may extend the time limit by not more than 10 working days if such extension is:

(1) Necessary for locating records or transferring them from physically separate facilities; or

(2) Necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single or series of closely related requests; or

(3) Necessary for consultation with another agency having a substantial interest in the determination, or for consultation among two or more components of the Commission having substantial subject matter interest therein.

(C) If the deciding official (as designated by the General Counsel) extends the time limit for initial determination pursuant to paragraph (a)(1)(iii)(B) of this section, the requester will be notified in accordance with 5 U.S.C. 552(a)(6)(B). In exceptional circumstances, when the request cannot be processed within the extended time limit, the requester will be so notified and provided an opportunity to limit the scope of the request so that it may be processed within such time limit, or to arrange an alternative time frame for processing the request or a modified request. “Exceptional” circumstances will not include delays resulting from a predictable workload of requests under this section. Unwillingness to make reasonable modifications in the scope of the request or to agree to an alternative time frame may be considered as factors in determining whether exceptional circumstances exist and whether the agency has exercised due diligence in responding to the request.

(D) If the deciding official (as designated by the General Counsel) reasonably believes that requests made by a requester, or a group of requesters acting in concert, actually constitute a single request that would otherwise involve unusual circumstances, as specified in paragraph (a)(1)(iii)(B) of this section, and the requests involve clearly related matters, those multiple requests may be aggregated.

(E) If a request is not granted within the time limits set forth in paragraphs (a)(1)(iii) (A) and (B) of this section, the request shall be deemed to be denied and the requesting party may appeal such denial to the General Counsel in accordance with paragraph (a)(2) of this section.

(iv) *Initial determination.* (A) The deciding official (as designated by the General Counsel) will make reasonable efforts to search, using either manual or electronic means, for the requested records in electronic form or format, except when such efforts would significantly interfere with the operation of the Commission’s automated information systems. Access will be granted to requested records, or any portions thereof, that must be made available under the Freedom of Information Act.

Access will be denied to records that are exempt under the Freedom of Information Act, 5 U.S.C. 552(b), unless the deciding official (as designated by the General Counsel) determines that such records fall within a category the Commission or the General Counsel has previously authorized to be made available to the public as a matter of policy. Denials will set forth the reasons therefor and advise the requester that this determination may be appealed to the General Counsel if the requester believes either that the records are not exempt, or that the General Counsel should exercise discretion to release such records notwithstanding their exempt status. The deciding official (as designated by the General Counsel) will also provide a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials.

(B) The deciding official (as designated by the General Counsel) is deemed to be the sole official responsible for all denials of initial requests, except denials of access to materials contained in active investigatory files, in which case the Director or Deputy Director of the Bureau or the Director of the Regional Office responsible for the investigation will be the responsible official.

(C) Records to which access has been granted will be made available to the requester in any form or format specified by the requester, if the records are readily reproducible in that form or format, or can be converted to that form or format with a reasonable amount of effort, and they will remain available for inspection and copying for a period not to exceed 30 days from date of notification to the requester unless the requester asks for and receives the consent of the deciding official (as designated by the General Counsel) to a longer period. Records assembled pursuant to a request will remain available only during this period and thereafter will be refiled. Appropriate fees may be imposed for any new or renewed request for the same records.

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(D) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(2) *Appeals to the General Counsel from initial denials*—(i) *Form and contents; time of receipt.* (A)(1) If an initial request for expedited treatment is denied, the requester, at any time before the initial determination of the underlying request for records by the deciding official (as designated by the General Counsel) (or, if the request for expedited treatment was filed with any appeal filed under paragraph (a)(2)(i)(A)(2) of this section, at any time before the General Counsel's determination on such an appeal), may appeal the denial of expedited treatment to the General Counsel.

(2) If an initial request for records is denied in its entirety, the requester may, within 30 days of the date of the determination, appeal such denial to the General Counsel. If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.

(3) The appeal shall be in writing and should include a copy of the initial request and a copy of the response to that initial request, if any. The appeal shall be addressed as follows: Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the appeal in accordance with paragraph (a)(2)(i)(A) of this section will result in the appeal (and any request for expedited treatment filed with that appeal) being treated as received on the actual date of receipt by the Office of General Counsel.

(C) Each appeal to the General Counsel which requests him to exercise his discretion to release exempt records shall set forth the interest of the requester in the subject matter and the purpose for which the records will be used if the request is granted.

(ii) *Time limit for appeal.* (A)(1) Regarding appeals from initial denials of a request for expedited treatment, the

General Counsel will either grant or deny the appeal expeditiously;

(2) Regarding appeals from initial denials of a request for records, the General Counsel will, within 20 working days of the receipt of such an appeal, either grant or deny it, in whole or in part, unless expedited treatment has been granted in accordance with this section, in which case the appeal will be processed as soon as practicable.

(B) The General Counsel may, by written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), extend the time limit for deciding an appeal by not more than 10 working days pursuant to paragraph (a)(1)(iii)(B) of this section, provided that the amount of any extension utilized during the initial consideration of the request under that paragraph will be subtracted from the amount of additional time otherwise available. Where exceptional circumstances do not permit the processing of the appeal within the extended time limit, the notice and procedures set forth in paragraph (a)(1)(iii)(C) of this section shall apply.

(iii) *Determination of appeal.* (A) The General Counsel has the authority to grant or deny all appeals and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In unusual or difficult cases, the General Counsel may, in his or her sole discretion, refer an appeal to the Commission for determination. A denial of an appeal in whole or in part will set forth the basis for the denial; will include a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials; and will advise the requester that judicial review of the decision is available by civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(B) The General Counsel shall be deemed solely responsible for all denials of appeals, except where an appeal is denied by the Commission. In such instances, the Commission shall be

deemed solely responsible for the denial.

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, et seq., is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of § 4.10(a)(9), that is responsive to the request that the request has been received. No other notice need be provided prior to granting the request. The Commission will inform the committee or subcommittee that the submitter considers such information confidential.

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal and State governments for nonpublic records shall be addressed to a liaison officer, where the Commission has appointed such an officer, or if there is none, to the General Counsel. With respect to requests under this paragraph, the General Counsel, the General Counsel's designee, or the appropriate liaison officer is delegated the authority to dispose of them. Alternatively, the General Counsel may refer such requests to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. Prior to granting access under this section to any material submitted to the Commission, the General Counsel, the General Counsel's designee, or the liaison officer will obtain from the requester a certification that such information will be maintained in confidence and will be used only for official law enforcement purposes. The certificate will also describe the nature of the law enforcement activity and the anticipated relevance of the infor-

mation to that activity. A copy of the certificate will be forwarded to the submitter of the information at the time the request is granted unless the agency requests that the submitter not be notified. Requests for material pursuant to compulsory process, or for voluntary testimony, in cases or matters in which the Commission is not a party will be treated in accordance with paragraph (e) of this section.

(d) *Requests from Federal and State agencies for purposes other than law enforcement.* Requests from Federal and State agencies for access to nonpublic records for purposes not related to law enforcement should be addressed to the General Counsel. The General Counsel or the General Counsel's designee is delegated the authority to dispose of requests under this paragraph. Disclosure of nonpublic information will be made consistent with sections 6(f) and 21 of the FTC Act. Requests under this section shall be subject to the fee and fee waiver provisions of § 4.8. Requests for material pursuant to compulsory process, or for voluntary testimony, in cases or matters in which the Commission is not a party will be treated in accordance with paragraph (e) of this section.

(e) *Requests for testimony, pursuant to compulsory process or otherwise, and requests for material pursuant to compulsory process, in cases or matters to which the Commission is not a party.* (1) The procedures specified in this section will apply to compulsory process and requests for voluntary testimony directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to compulsory process and requests for voluntary testimony directed to former Commission employees or to current or former special government employees of the Commission that seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply when requests described above are directed to the Commission. For purposes of this section, the term *testimony* includes any written or oral statement by a witness, such as depositions, affidavits, declarations, and

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statements at a hearing or trial; the term *nonpublic* includes any material or information which, under §4.10, is not required to be made public; the term *employees*, except where otherwise specified, includes *special government employees* and other Commission employees; and the term *special government employees* includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with compulsory process shall promptly advise the General Counsel of its service, the nature of the material or information sought, and all relevant facts and circumstances. This notification requirement also applies to any employee or former employee whose testimony is sought on a voluntary basis under the conditions set forth in paragraph (e)(1) of this section.

(3) A party who causes compulsory process to be issued to, or who requests testimony by, the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel, unless, with respect to a request by a Federal or State agency, the General Counsel determines, as a matter of discretion, to waive this requirement. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon compulsory process and requests for voluntary testimony under this section with due regard for statutory restrictions, the Commission's

rules and the public interest, taking into account such factors as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and material.

(6) Invitations to testify before Congressional committees or subcommittees or to testify before other government bodies on the possible effects of legislative and regulatory proposals are not subject to paragraphs (e)(1) through (5) of this section.

(f) Requests by current or former employees to use nonpublic memoranda as writing samples shall be addressed to the General Counsel. The General Counsel or the General Counsel's designee is delegated the authority to dispose of such requests consistent with applicable nondisclosure provisions, including sections 6(f) and 21 of the FTC Act.

(g) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive order, or regulation. However, an employee shall not use information obtained as a result of his Government employment, except to the extent that such information has been made available to the general public or will be made available on request, or when the General Counsel or the General Counsel's designee gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(h) The General Counsel (or General Counsel's designee) may authorize a Commission member, other Commission official, or Commission staff to disclose an item or category of information from Commission records not currently available to the public for routine inspection and copying under Rule 4.9(b) where the General Counsel (or General Counsel's designee) determines that such disclosure would facilitate the conduct of official agency business and would not otherwise be

prohibited by applicable law, order, or regulation. Requests for such determinations shall be set forth in writing and, in the case of staff requests, shall be forwarded to the General Counsel (or General Counsel's designee) through the relevant Bureau. In unusual or difficult cases, the General Counsel may refer the request to the Commission for determination.

(i) The Director of the Bureau of Competition is authorized, without power of redelegation, to respond to access requests for records and other materials pursuant to an agreement under the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201 et seq. Before responding to such a request, the Bureau Director shall transmit the proposed response to the Secretary and the Secretary shall notify the Commission of the proposed response. If no Commissioner objects within three days following the Commission's receipt of such notification, the Secretary shall inform the Bureau Director that he or she may proceed.

(j)(1) The procedures specified in this section apply to disclosures of certain records to foreign law enforcement agencies in specified circumstances in accordance with the U.S. SAFE WEB Act of 2006. Nothing in this section authorizes the disclosure of material obtained in connection with the administration of the Federal antitrust laws or foreign antitrust laws, as defined in paragraph (j)(5)(i) of this section.

(2) Requests from foreign law enforcement agencies, as defined in paragraph (j)(5)(ii) of this section, for non-public records shall be addressed to the Director of the Office of International Affairs or the Director's designee, who shall forward them to the General Counsel with recommendations for disposition after obtaining any required certification described in paragraph (j)(3) of this section and approval of the Bureau of Consumer Protection. With respect to requests under this paragraph, the General Counsel or the General Counsel's designee is delegated the authority to dispose of them. Alternatively, the General Counsel may refer such requests to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau of

Consumer Protection or the Office of International Affairs disagrees with the General Counsel's proposed disposition.

(3) Access under this section to any material subject to the disclosure restrictions in sections 6(f) or 21(b) of the FTC Act or §4.10(d) may not be granted unless—

(i) An appropriate official of the foreign law enforcement agency has certified, either by prior agreement or memorandum of understanding or by other written certification, that such material will be maintained in confidence and will be used only for official law enforcement purposes; and

(ii)(A) The foreign law enforcement agency has set forth a bona fide legal basis for its authority to maintain the material in confidence;

(B) The materials are to be used for purposes of investigating, or engaging in enforcement proceedings related to, possible violations of:

(I) Foreign laws prohibiting fraudulent or deceptive commercial practices, or other practices substantially similar to practices prohibited by any law administered by the Commission;

(2) A law administered by the Commission, if disclosure of the material would further a Commission investigation or enforcement proceeding; or

(3) With the approval of the Attorney General, other foreign criminal laws, if such foreign criminal laws are offenses defined in or covered by a criminal mutual legal assistance treaty in force between the government of the United States and the foreign law enforcement agency's government;

(C) The appropriate Federal banking agency, (as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) or, in the case of a Federal credit union, the National Credit Union Administration has given its prior approval if the materials to be provided under paragraph (j)(3)(ii)(B) of this section are requested by the foreign law enforcement agency for the purpose of investigating, or engaging in enforcement proceedings based on, possible violations of law by a bank, a savings and loan institution described in section 18(f)(3) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(3)), or

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a Federal credit union described in section 18(f)(4) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(4)); and

(D) The foreign law enforcement agency is not from a foreign state that the Secretary of State has determined, in accordance with section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), has repeatedly provided support for acts of international terrorism, unless and until such determination is rescinded pursuant to section 6(j)(4) of that Act (50 U.S.C. App. 2405(j)(4)).

(4) A copy of the certificate described in paragraph (j)(3) of this section will be forwarded to the submitter of the information at the time the request is granted unless the foreign law enforcement agency requests that the submitter not be notified.

(5) For purposes of this section:

(i) “Federal antitrust laws” and “foreign antitrust laws” are to be interpreted as defined in paragraphs (5) and (7), respectively, of section 12 of the International Antitrust Enforcement Assistance Act of 1994 (15 U.S.C. 6211); and

(ii) “Foreign law enforcement agency” is defined as:

(A) Any agency or judicial authority of a foreign government, including a foreign state, a political subdivision of a foreign state, or a multinational organization constituted by and comprised of foreign states, that is vested with law enforcement or investigative authority in civil, criminal, or administrative matters and

(B) Any multinational organization, to the extent that it is acting on behalf of an entity described in paragraph (j)(5)(i)(A) of this section.

(15 U.S.C. 41 et seq.)

[40 FR 7629, Feb. 21, 1975]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 4.11, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.fdsys.gov](http://www.fdsys.gov).

### § 4.12 Disposition of documents submitted to the Commission.

(a) *Material submitted to the Commission.* (1) Any person who has submitted material to the Commission may obtain, on request, the return of material

submitted to the Commission which has not been received into evidence:

(i) After the close of the proceeding in connection with which the material was submitted; or

(ii) When no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation.

(2) Such request shall be in writing, addressed to the custodian designated pursuant to § 2.16 or the Secretary of the Commission in all other circumstances, and shall reasonably describe the material requested. A request for return of material may be filed at any time, but material will not be returned nor will commitments to return material be undertaken prior to the time described in this paragraph.

(b) *Commission-made copies of documents submitted to the Commission.* The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

(c) *Disposition of material not returned.* Subsequent to the time prescribed in paragraph (a) of this section, the staff will examine all submitted material and Commission-made copies of documents located in a reasonable search of the Commission’s files and will determine, consistent with the Federal Records Act, 44 U.S.C. 3301, which materials are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission or because of the information value of data in them. The Commission will dispose of all material determined not to be appropriate for preservation in accordance with applicable regulations of the National Archives and Records Administration.

[46 FR 26292, May 12, 1981, as amended at 60 FR 37751, July 21, 1995]

### § 4.13 Privacy Act rules.

(a) *Purpose and scope.* (1) This section is promulgated to implement the Privacy Act of 1974 (Pub. L. 93-579, 5

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U.S.C. 552a) by establishing procedures whereby an individual can, as to all systems of records maintained by the Commission except those set forth in § 4.13(m) as exempt from disclosure, (i) Request notification of whether the Commission maintains a record pertaining to him in any system of records, (ii) request access to such a record or to an accounting of its disclosure, (iii) request that the record be amended or corrected, and (iv) appeal an initial adverse determination of any such request. This section also establishes those systems of records that are specifically exempt from disclosure and from other requirements.

(2) The procedures of this section apply only to requests by an individual as defined in § 4.13(b). Except as otherwise provided, they govern only records containing personal information in systems of records for which notice has been published by the Commission in the FEDERAL REGISTER pursuant to section 552a(e)(4) of the Privacy Act of 1974 and which are neither exempt from the provisions of this section nor contained in government-wide systems of personnel records for which notice has been published in the FEDERAL REGISTER by the Office of Personnel Management. Requests for notification, access, and amendment of personnel records which are contained in a system of records for which notice has been given by the Office of Personnel Management are governed by the Office of Personnel Management's notices, 5 CFR part 297. Access to records which are not subject to the requirements of the Privacy Act are governed by §§ 4.8 through 4.11.

(b) *Definitions.* The following definitions apply to this section only:

(1) *Individual* means a natural person who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) *Record* means any item, collection, or grouping of personal information about an individual that is maintained by the Commission, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the

individual, such as a finger or voice print or a photograph, but does not include information concerning proprietorships, businesses, or corporations.

(3) *System of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual, for which notice has been published by the Commission in the FEDERAL REGISTER pursuant to 5 U.S.C. 552a(e)(4).

(c) *Procedures for requests pertaining to individual records in a record system.* An individual may request access to his or her records or any information pertaining to that individual in a system of records, and notification of whether and to whom the Commission has disclosed a record for which an accounting of disclosures is required to be kept and made available to the individual, using the procedures of this section. Requests for the disclosure of records under this section or to determine whether a system of records contains records pertaining to an individual or to obtain an accounting of disclosures, shall be in writing and if mailed, addressed as follows:

Privacy Act Request, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

If requests are presented in person at the Office of the General Counsel, the individual shall be required to execute a written request. All requests shall name the system of records that is the subject of the request, and shall include any additional information specified in the pertinent system notice as necessary to locate the records requested. If the requester wants another person to accompany him or her to review the records, the request shall so state. Nothing in this section will allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(d) *Times, places, and requirements for identification of individuals making requests.* Verification of identity of persons making written requests to the deciding official (as designated by the General Counsel) ordinarily will not be

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required. The signature on such requests will be deemed a certification by the signatory that he or she is the individual to whom the record pertains or is the parent or guardian of a minor or the legal guardian of the individual to whom the record pertains. The deciding official (as designated by the General Counsel) may require additional verification of a requester's identity when such information is reasonably necessary to assure that records are not improperly disclosed; provided, however, that no verification of identity will be required if the records sought are publicly available under the Freedom of Information Act.

(e) *Disclosure of requested information to individuals.* Within 10 working days of receipt of a request under § 4.13(c), the deciding official (as designated by the General Counsel) will acknowledge receipt of the request. Within 30 working days of the receipt of a request under § 4.13(c), the deciding official (as designated by the General Counsel) will inform the requester whether a system of records containing retrievable information pertaining to the requester exists, and if so, either that the request has been granted or that the requested records or information is exempt from disclosure pursuant to § 4.13(m). When, for good cause shown, the deciding official (as designated by the General Counsel) is unable to respond within 30 working days of the receipt of the request, that official will notify the requester and inform him or her approximately when a response will be made.

(f) *Special procedures: Medical records.* When the deciding official (as designated by the General Counsel) determines that disclosure of a medical or psychological record directly to a requesting individual could have an adverse effect on the individual, he or she will require the individual to designate a medical doctor to whom the record will be transmitted.

(g) *Request for correction or amendment of record.* An individual to whom access to his records or any information pertaining to him in a system of records has been granted may request that any portion thereof be amended or corrected because he believes it is not accurate, relevant, timely, or complete. An initial request for correction or

amendment of a record shall be in writing whether presented in person or by mail, and if by mail, addressed as in § 4.13(c). In making a request under this subsection, the requesting party shall state the nature of the information in the record the individual believes to be inaccurate, irrelevant, untimely, or incomplete, the correction or amendment desired, and the reasons therefore.

(h) *Agency review of request for correction or amendment of record.* Whether presented in person or by mail, requests under § 4.13(g) will be acknowledged by the deciding official (as designated by the General Counsel) within 10 working days of the receipt of the request if action on the request cannot be completed and the individual notified of the results within that time. Thereafter, the deciding official (as designated by the General Counsel) will promptly either make the requested amendment or correction or inform the requester of his refusal to make the amendment or correction, the reasons for the refusal, and the requester's right to appeal that refusal in accordance with § 4.13(i).

(i) *Appeal of initial adverse agency determination.* (1) If an initial request filed under § 4.13(c) or § 4.13(g) is denied, the requester may appeal that denial to the General Counsel. The appeal shall be in writing and addressed as follows:

Privacy Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

Within 30 working days of the receipt of the appeal, the General Counsel will notify the requester of the disposition of that appeal, except that the General Counsel may extend the 30-day period for good cause, in which case, the General Counsel will advise the requester of the approximate date on which review will be completed. In unusual or difficult cases, the General Counsel may, in his or her sole discretion, refer an appeal to the Commission for determination.

(2)(i) If the General Counsel refuses to amend or correct the record in accordance with a request under § 4.13(g),

the General Counsel will notify the requester of that decision and inform the requester of the right to file with the deciding official (as designated by the General Counsel) a concise statement setting forth the reasons for the requester's disagreement with the General Counsel's determination and the fact that the requester's statement will be treated as set forth in paragraph (i)(2)(ii) of this section. The General Counsel will also inform the requester that judicial review of the decision is available by a civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(ii) If the individual files a statement disagreeing with the General Counsel's determination not to amend or correct a record, such disagreement will be clearly noted in the record involved and the individual's statement will be made available to anyone to whom the record has been disclosed after September 27, 1975, or is subsequently disclosed together with, if the General Counsel deems it appropriate, a brief statement of his or her reasons for declining to amend the record.

(j) *Disclosure of record to person other than the individual to whom it pertains.* Except as provided by 5 U.S.C. 552a(b), the written request or prior written consent of the individual to whom a record pertains, or of his parent if a minor, or legal guardian if incompetent, shall be required before such record is disclosed. If the individual elects to inspect a record in person and desires to be accompanied by another person, the deciding official (as designated by the General Counsel) may require the individual to furnish a signed statement authorizing disclosure of his or her record in the presence of the accompanying named person.

(k) *Fees.* No fees will be charged for searching for a record, reviewing it, or for copies of records made by the Commission for its own purposes incident to granting access to a requester. Copies of records to which access has been granted under this section may be obtained by the requester from the deciding official (as designated by the General Counsel) on payment of the reproduction fees provided in §4.8(b)(6).

(1) *Penalties.* Section 552a(i)(3) of the Privacy Act, 5 U.S.C. 552a(i)(3), makes it a misdemeanor, subject to a maximum fine of \$5,000, to knowingly and willfully request or obtain any record concerning an individual under false pretenses. Sections 552a(i) (1) and (2) of the Privacy Act, 5 U.S.C. 552a(i) (1) and (2), provide penalties for violations by agency employees of the Privacy Act or regulations established thereunder. Title 18 U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense, subject to a maximum fine of \$10,000 or imprisonment for not more than 5 years or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

(m) *Specific exemptions.* (1) Pursuant to 5 U.S.C. 552a(j)(2), investigatory materials maintained by an agency component in connection with any activity relating to criminal law enforcement in the following systems of records are exempt from all subsections of 5 U.S.C. 552a, except (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i), and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(j)(2):

Office of Inspector General Investigative Files—FTC

(2) Pursuant to 5 U.S.C. 552a(k)(2), investigatory materials compiled for law enforcement purposes in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(2):

Investigational, Legal, and Public Records—FTC

Disciplinary Action Investigatory Files—FTC

Clearance to Participate Applications and the Commission's Responses Thereto, and Related Documents—FTC

Management Information System—FTC

Office of the Secretary Control and Reporting System—FTC

Office of Inspector General Investigative Files—FTC

Stenographic Reporting Service Requests—FTC

Identity Theft Complaint Management System—FTC

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Freedom of Information Act Requests and Appeals—FTC  
Privacy Act Requests and Appeals—FTC  
Information Retrieval and Indexing System—FTC

(3) Pursuant to 5 U.S.C. 552a(k)(5), investigatory materials compiled to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only where disclosure would reveal the identity of a confidential source of information, in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(5):

Personnel Security File—FTC

[40 FR 40780, Sept. 3, 1975, as amended at 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983; 55 FR 37700, Sept. 13, 1990; 55 FR 38801, Sept. 21, 1990; 57 FR 10808, Mar. 31, 1992; 58 FR 7047, Feb. 4, 1993; 63 FR 45648, Aug. 26, 1998; 64 FR 3014, Jan. 20, 1999; 64 FR 69397, Dec. 13, 1999; 66 FR 64144, Dec. 12, 2001; 67 FR 123, Jan. 2, 2002]

### § 4.14 Conduct of business.

(a) Matters before the Commission for consideration may be resolved either at a meeting under § 4.15 or by written circulation. Any Commissioner may direct that a matter presented for consideration be placed on the agenda of a Commission meeting.

(b) A majority of the members of the Commission in office and not recused from participating in a matter (by virtue of 18 U.S.C. 208 or otherwise) constitutes a quorum for the transaction of business in that matter.

(c) Any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule or where the action is taken pursuant to a valid delegation of authority. No Commissioner may delegate the authority to determine his or her vote in any matter requiring Commission action, but authority to report a Commissioner's vote on a particular matter resolved either by written circulation, or at a meeting held in the

Commissioner's absence, may be vested in a member of the Commissioner's staff.

[42 FR 13540, Mar. 11, 1977, as amended at 50 FR 53306, Dec. 31, 1985; 70 FR 53297, Sept. 8, 2005]

### § 4.15 Commission meetings.

(a) *In general.* (1) Meetings of the Commission, as defined in 5 U.S.C. 552b(a)(2), are held at the principal office of the Commission, unless otherwise directed.

(2) *Initial announcements of meetings.* For each meeting, the Commission shall announce:

(i) The time, place and subject matter of the meeting,

(ii) Whether the meeting will be open or closed to the public, and

(iii) The name and phone number of the official who will respond to requests for information about the meeting.

Such announcement shall be made at least one week before the meeting except that where the agency determines pursuant to 5 U.S.C. 552b(e)(1) to call the meeting on less than one week's notice, or where the agency determines to close the meeting pursuant to paragraph (c)(2) of this section, the announcement shall be made at the earliest practicable time.

(3) *Announcements of changes in meetings.* Following the announcement of a meeting, any change in the time, place or subject matter will be announced at the earliest practicable time, and, except with respect to meetings closed under paragraph (c)(2) of this section, any change in the subject matter or decision to open or close a meeting shall be made only as provided in 5 U.S.C. 552b(e)(2).

(4) *Deletions from announcements.* The requirements of paragraphs (a)(2) and (a)(3) of this section do not require the disclosure of any information pertaining to a portion of a closed meeting where such disclosure is likely to concern a matter within the scope of 5 U.S.C. 552b(c).

(5) *Dissemination of notices.* Notices required under paragraphs (a)(2) and (a)(3) of this section will be posted at the principal office of the Commission,

recorded on a telephone message device, and, except as to notices of meetings closed under paragraph (c)(2) of this section, submitted to the FEDERAL REGISTER for publication. In addition, notices issued under paragraph (a)(2) of this section one week in advance of the meeting will be sent to all persons and organizations who have requested inclusion on a meeting notice mailing list, and will be issued as a press release to interested media.

(b) *Open meetings.* (1) Commission meetings shall be open to public observation unless the Commission determines that portions may be closed pursuant to 5 U.S.C. 552b(c).

(2) Any person whose interest may be directly affected if a portion of a meeting is open, may request that the Commission close that portion for any of the reasons described in 5 U.S.C. 552b(c). The Commission shall vote on such requests if at least one member desires to do so. Such requests shall be in writing, filed at the earliest practicable time, and describe how the matters to be discussed will have any of the effects enumerated in 5 U.S.C. 552b(c). Requests shall be addressed as follows:

Closed Meeting Request, Office of the General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

(3) The Commissioner to whom a matter has been assigned for presentation to the Commission shall have the authority to make available to the public, prior to consideration of that matter at an open meeting, material sufficient to inform the public of the issues likely to be discussed in connection with that matter.

(c) *Closed meetings.* (1) Whenever the Commission votes to close a meeting or series of meetings under these rules, it shall make publicly available within one day notices both of such vote and the General Counsel's determination regarding certification under 5 U.S.C. 552b(f)(1). Such determination by the General Counsel shall be made prior to the Commission vote to close a meeting or series of meetings. Further, except with respect to meetings closed under paragraph (c)(2) of this section, the Commission shall make publicly available within one day a full written

explanation of its action in closing any meeting, and a list specifying the names and affiliations of all persons expected to attend, except Commission employees and consultants and any stenographer or court reporter attending for the sole purpose of preparing a verbatim transcript. All Commission employees and consultants may attend nonadjudicative portions of any closed meeting and members of Commissioners' personal staffs, the General Counsel and his staff, and the Secretary and his staff may attend the adjudicative portions of any closed meeting except to the extent the notice of a particular closed meeting otherwise specifically provides. Stenographers or court reporters may attend any closed meeting at which their services are required by the Commission.

(2) If a Commission meeting, or portions thereof, may be closed pursuant to 5 U.S.C. 552b(c)(10), the Commission may, by vote recorded at the beginning of the meeting, or portion thereof, close the portion or portions of the meeting so exempt.

(3) Closed meeting transcripts or minutes required by 5 U.S.C. 552b(f)(1) will be released to the public insofar as they contain information that either is not exempt from disclosure under 5 U.S.C. 552b(c), or, although exempt, should be disclosed in the public interest. The Commission will determine whether to release, in whole or in part, the minutes of its executive sessions to consider oral arguments. With regard to all other closed meetings, the General Counsel or the General Counsel's designee shall determine, in accordance with § 4.9(c), which portions of the transcripts or minutes may be released.

(d) The presiding officer shall be responsible for preserving order and decorum at meetings and shall have all powers necessary to that end.

[42 FR 13541, Mar. 11, 1977; 42 FR 15409, Mar. 22, 1977, as amended at 42 FR 62912, Dec. 14, 1977; 43 FR 1937, Jan. 13, 1978; 43 FR 35684, Aug. 11, 1978; 63 FR 32978, June 17, 1998]

#### § 4.16 Privilege against self-incrimination.

Section 2.11 of Pub. L. 91-462 specifically repeals paragraph 7 of section 9 of the Federal Trade Commission Act.

Title 18, section 6002, of the United States Code provides that whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to:

(a) A court or grand jury of the United States,

(b) An agency of the United States, or

(c) Either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under section 6004, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Title 18, section 6004, of the United States Code provides that:

(1) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of section 6004, an order requiring the individual to give testimony or provide other information which he refused to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in title 18, section 6002, of the United States Code;

(2) An agency of the United States may issue an order under subsection (a) of section 6004 only if in its judgment

(i) The testimony or other information from such individual may be necessary to the public interest; and

(ii) Such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(18 U.S.C. 6002, 6004)

[37 FR 5017, Mar. 9, 1972. Redesignated at 45 FR 36345, May 29, 1980]

#### § 4.17 Disqualification of Commissioners.

(a) *Applicability.* This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative or rulemaking proceeding.

(b) *Procedures.* (1) Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

(2) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(3)(i) Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought.

(ii) In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.

(c) *Standards.* Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.

(15 U.S.C. 46(g))

[46 FR 45750, Sept. 15, 1981]

### PART 5—STANDARDS OF CONDUCT

#### Subpart A—Employee Conduct Standards and Financial Conflicts of Interest

Sec.

5.1 Cross-reference to executive branch-wide regulations.

5.2 Exemption of insubstantial financial conflicts.

#### Subpart B—Financial Disclosure Requirements

5.10 Cross-reference to executive branch-wide regulations.

## § 5.1

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### Subparts C–D [Reserved]

### Subpart E—Disciplinary Actions Concerning Postemployment Conflict of Interest

- 5.51 Scope and applicability.
- 5.52 Nonpublic proceedings.
- 5.53 Initiation of investigation.
- 5.54 Referral to the Office of Government Ethics and to the Department of Justice.
- 5.55 Conduct of investigation.
- 5.56 Disposition.
- 5.57 Order to show cause.
- 5.58 Answer and request for a hearing.
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- 5.60 Scheduling of hearing.
- 5.61 Prehearing procedures; motions; interlocutory appeals; summary decision; discovery; compulsory process.
- 5.62 Hearing rights of respondent.
- 5.63 Evidence; transcript; *in camera* orders; proposed findings of fact and conclusions of law.
- 5.64 Initial decision.
- 5.65 Review of initial decision.
- 5.66 Commission decision and reconsideration.
- 5.67 Sanctions.
- 5.68 Judicial review.

AUTHORITY: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); 15 U.S.C. 46(g); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR part 2635, unless otherwise noted.

SOURCE: 32 FR 13272, Sept. 20, 1967, unless otherwise noted. Redesignated at 41 FR 54483, Dec. 14, 1976.

### Subpart A—Employee Conduct Standards and Financial Conflicts of Interest

#### § 5.1 Cross-reference to executive branch-wide regulations.

Commissioners and employees, including special government employees, of the Federal Trade Commission (FTC) are subject to and should refer to the “Standards of Ethical Conduct for Employees of the Executive Branch” at 5 CFR part 2635 (“executive branch-wide Standards of Conduct”) and to the FTC regulations at 5 CFR 5701 that supplement the executive branch-wide Standards of Conduct.

[58 FR 15764, Mar. 24, 1993, as amended at 64 FR 42594, Aug. 5, 1999]

#### § 5.2 Exemption of insubstantial financial conflicts.

(a) An employee or special Government employee will not be subject to remedial or disciplinary action or to criminal prosecution under 18 U.S.C. 208(a), if he makes a full disclosure in writing to the official responsible for his appointment of the nature and circumstances of the particular matter involved and of his conflicting financial interest relating thereto, and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the employee or special Government employee.

(b) For the purposes of paragraph (a) of this section, the “official responsible for appointment” shall be the Executive Director in all cases where the employee is classified at grade GS-15 or below, or at a comparable pay level, except that each Commissioner shall be the “official responsible for appointment” of advisors in the Commissioner’s immediate office.

(c) In all other cases, the Chairman shall be the “official responsible for appointment.”

(d) Pursuant to 5 CFR part 2640, certain financial interests are exempted from the provisions of 18 U.S.C. 208(a) as being too remote too inconsequential to affect the integrity of an employee’s services.

[58 FR 15764, Mar. 24, 1993, as amended at 63 FR 35130, June 29, 1998]

### Subpart B—Financial Disclosure Requirements

#### § 5.10 Cross-reference to executive branch-wide regulations.

Commissioners and employees, including special government employees, of the Federal Trade Commission are subject to and should refer to the executive branch-wide financial disclosure regulations at 5 CFR part 2634, and to the procedures for filing and review of financial disclosure reports found in Chapter 3 of the FTC *Administrative Manual*.

[58 FR 15765, Mar. 24, 1993]

**Subparts C–D [Reserved]****Subpart E—Disciplinary Actions  
Concerning Postemployment  
Conflict of Interest**

AUTHORITY: 15 U.S.C. 41 et seq.

SOURCE: 46 FR 26050, May 11, 1981, unless otherwise noted.

**§ 5.51 Scope and applicability.**

These regulations establish procedures for investigating and determining alleged violations of 18 U.S.C. 207 (postemployment restrictions applicable to federal employees) or regulations issued by the Office of Government Ethics, set forth in 5 CFR parts 2637 and 2641, reflecting the views of the Office of Government Ethics and the Department of Justice as to the requirements of 18 U.S.C. 207.

[58 FR 15765, Mar. 24, 1993]

**§ 5.52 Nonpublic proceedings.**

Any investigation or proceedings held under this part shall be nonpublic unless the respondent specifically requests otherwise, except to the extent required by the Freedom of Information Act (5 U.S.C. 552) or by the Sunshine Act (5 U.S.C. 552b). However, the presiding official's initial decision and any final decision of the Commission shall be placed on the public record, except that information may be designated *in camera* in accordance with § 3.45 of the Commission's Rules of Practice.

**§ 5.53 Initiation of investigation.**

(a) Investigations under this part may be initiated upon the submission by any person of a written statement to the Secretary setting forth sufficient information to indicate a possible violation of 18 U.S.C. 207 or by the Commission on its own initiative when a possible violation is indicated by information within the Commission's possession.

(b) At the direction of the Commission, the General Counsel shall investigate any alleged violation of 18 U.S.C. 207.

**§ 5.54 Referral to the Office of Government Ethics and to the Department of Justice.**

(a) The General Counsel shall make a preliminary determination of whether the matter appears frivolous and, if not, shall expeditiously transmit any available information to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice.

(b) Unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution, the General Counsel shall coordinate any investigation or proceeding under this part with the Department of Justice in order to avoid prejudicing criminal proceedings.

**§ 5.55 Conduct of investigation.**

(a) The General Counsel may (1) exercise the authority granted in § 2.5 of the Commission's Rules of Practice to administer oaths and affirmations; and (2) conduct investigational hearings pursuant to part 2 of these rules. He may also recommend that the Commission issue compulsory process in connection with an investigation under this section.

(b) Witnesses in investigations shall have the rights set forth in § 2.9 of the Commission's Rules of Practice.

**§ 5.56 Disposition.**

(a) Upon the conclusion of an investigation under this part, the General Counsel shall forward to the Commission a summary of the facts disclosed by the investigation along with a recommendation as to whether the Commission should issue an order to show cause pursuant to § 5.57.

(b) When the former government employee involved is an attorney, the General Counsel shall also recommend whether the matter should be referred to the disciplinary committee of the bar(s) of which the attorney is a member.

**§ 5.57 Order to show cause.**

(a) Upon a Commission determination that there exists reasonable cause to believe a former government employee has violated 18 U.S.C. 207, the

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Commission may issue an order requiring the former employee to show cause why sanctions should not be imposed.

(b) The show cause order shall contain:

(1) The statutory provisions alleged to have been violated and a clear and concise description of the acts of the former employee that are alleged to constitute the violation;

(2) Notice of the respondent's right to submit an answer and request a hearing, and the time and manner in which the request is to be made; and

(3) A statement of the sanctions that may be imposed pursuant to § 5.67 of this part.

(c) Subsequent to the issuance of an order to show cause, any communications to or from the Commission or any member of the Commission shall be governed by the *ex parte* provisions of § 4.7 of the Commission's Rules of Practice. 16 CFR 4.7.

## **§ 5.58 Answer and request for a hearing.**

(a) An answer and request for a hearing must be filed with the Secretary of the Commission within thirty (30) days after service of the order to show cause.

(b) In the absence of good cause shown, failure to file an answer and request for a hearing within the specified time limit:

(1) Will be deemed a waiver of the respondent's right to contest the allegations of the show cause order or request a hearing and

(2) Shall authorize the Commission to find the facts to be as alleged in the show cause order and enter a final decision providing for the imposition of such sanctions specified in § 5.67 as the Commission deems appropriate.

(c) An answer shall contain (1) a concise statement of the facts or law constituting each ground of defense and (2) specific admission, denial, or explanation of each fact alleged in the show cause order or, if the respondent is without knowledge thereof, a statement to that effect. Any allegations of a complaint not answered in this manner will be deemed admitted.

(d) Hearings shall be deemed waived as to any facts in the show cause order that are specifically admitted or

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deemed to be admitted as a result of respondent's failure to deny them. Those portions of respondent's answer, together with the show cause order, will provide a record basis for initial decision by the Administrative Law Judge or for final decision by the Commission.

(e) If all material factual allegations of the show cause order are specifically admitted or have been deemed admitted in accordance with paragraph (c) of this section, the Commission will decide the matter on the basis of the allegations set forth in the show cause order and respondent's answer.

## **§ 5.59 Presiding official.**

(a) Upon the receipt of an answer and request for a hearing, the Secretary shall refer the matter to the Chief Administrative Law Judge, who shall appoint an Administrative Law Judge to preside over the hearing and shall notify the respondent and the General Counsel as to the person selected.

(b) The powers and duties of the presiding official shall be as set forth in § 3.42(b) through (h) of the Commission's Rules of Practice.

## **§ 5.60 Scheduling of hearing.**

The presiding official shall fix the date, time and place of the hearing. The hearing shall not be scheduled earlier than fifteen days after receipt of the respondent's answer and request for a hearing. In fixing the time, date and place of the hearing, the presiding official shall give due regard to the respondent's need for adequate time to prepare a defense and an expeditious resolution of allegations that may be damaging to his or her reputation.

## **§ 5.61 Prehearing procedures; motions; interlocutory appeals; summary decision; discovery; compulsory process.**

Because of the nature of the issues involved in proceedings under this part, the Commission anticipates that extensive motions, prehearing proceedings and discovery will not be required in most cases. For this reason, detailed procedures will not be established under this part. However, to the extent deemed warranted by the presiding official, prehearing conferences,

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motions, interlocutory appeals, summary decisions, discovery and compulsory process shall be permitted and shall be governed, where appropriate, by the provisions set forth in subparts C and D, part 3, of the Commission's Rules of Practice.

### § 5.62 Hearing rights of respondent.

In any hearing under this subpart, the respondent shall have the right:

- (a) To be represented by counsel;
- (b) To present and cross-examine witnesses and submit evidence;
- (c) To present objections, motions, and arguments, oral or written; and
- (d) To obtain a transcript of the proceedings on request.

### § 5.63 Evidence; transcript; *in camera* orders; proposed findings of fact and conclusions of law.

Sections 3.43, 3.44, 3.45, and 3.46 of the Commission's Rules of Practice shall govern, respectively, the receipt and objections to admissibility of evidence, the transcript of the hearing, *in camera* orders and the submission and consideration of proposed findings of fact and conclusions of law except that (a) a copy of the hearing transcript shall be provided the respondent; and (b) the Commission has the burden of establishing, by a preponderance of the evidence on the record as a whole, the allegations stated in the order to show cause.

### § 5.64 Initial decision.

Section 3.51 of the Commission's Rules of Practice shall govern the initial decision in proceedings under this subpart, except that the determination of the Administrative Law Judge must be supported by a preponderance of the evidence.

### § 5.65 Review of initial decision.

Appeals from the initial decision of the Administrative Law Judge or review by the Commission in the absence of an appeal shall be governed by §§ 3.52 and 3.53 of the Commission's Rules of Practice except that oral arguments

shall be nonpublic subject to the exceptions stated in § 3.52 of this part.

### § 5.66 Commission decision and reconsideration.

The Commission's decision and any reconsideration or reopening of the proceeding shall be governed by §§ 2.51, 3.54, 3.55, 3.71 and 3.72 of the Commission's Rules of Practice, except that (a) if the initial decision is modified or reversed, the Commission shall specify such findings of fact and conclusions of law as are different from those of the presiding official; and (b) references therein to "court of appeals" shall be deemed for purposes of proceedings under this part to refer to "district court."

### § 5.67 Sanctions.

In the case of any respondent who fails to request a hearing after receiving adequate notice of the allegations pursuant to § 5.57 or who is found in the Commission's final decision to have violated 18 U.S.C. 207 (a), (b), or (c), the Commission may order such disciplinary action as it deems warranted, including:

- (a) Reprimand;
- (b) Suspension from participating in a particular matter or matters before the Commission; or
- (c) Prohibiting the respondent from making, with the intent to influence, any formal or informal appearance before, or any oral or written communication to, the Commission or its staff on any matter or business on behalf of any other person (except the United States) for a period not to exceed five (5) years.

### § 5.68 Judicial review.

A respondent against whom the Commission has issued an order imposing disciplinary action under this part may seek judicial review of the Commission's determination in an appropriate United States District Court by filing a petition for such review within sixty (60) days of receipt of notice of the Commission's final decision.

**PART 6—ENFORCEMENT OF NON-DISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL TRADE COMMISSION**

Sec.

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- 6.111 Notice.
- 6.112–6.129 [Reserved]
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- 6.161–6.169 [Reserved]
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- 6.171–6.999 [Reserved]

AUTHORITY: 29 U.S.C. 794, 794d.

SOURCE: 52 FR 45628, Dec. 1, 1987, unless otherwise noted.

**§ 6.101 Purpose.**

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service. This part also implements section 508 of the Rehabilitation Act of 1973, as amended, with respect to the accessibility of electronic and information technology developed, procured, maintained, or used by the agency.

[52 FR 45628, Dec. 1, 1987, as amended at 66 FR 51863, Oct. 11, 2001]

**§ 6.102 Application.**

This part applies to all programs or activities conducted by the Commission

except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

**§ 6.103 Definitions.**

For purposes of this part, the term—

*Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and to enjoy the benefits of, programs or activities conducted by the Commission. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

*Commission* means the Federal Trade Commission.

*Complete complaint* means a written statement that contains the complainant's name and address and describes the Commission's alleged discriminatory action in sufficient detail to inform the Commission of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

*Electronic and information technology* includes information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines.

The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation are not electronic and information technology.

*Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

*Individual with handicaps* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been

misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Commission as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Commission as having such an impairment.

*Information technology* means any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term "information technology" includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

*Qualified individual with handicaps* means—

(1) With respect to any Commission program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Commission can demonstrate would result in a fundamental alteration in its nature; and

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702 (f), which is made applicable to this part by § 6.140.

*Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

*Section 508* means section 508 of the Rehabilitation Act of 1973, as amended.

[52 FR 45628, Dec. 1, 1987, as amended at 66 FR 51863, Oct. 11, 2001]

**§§ 6.104–6.109 [Reserved]**

**§ 6.110 Self-evaluation.**

(a) The Commission shall, by February 1, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Commission shall proceed to make the necessary modifications.

(b) The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Commission shall, for at least three years following completion of the self-evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

**§ 6.111 Notice.**

The Commission shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Commission, and make such information available to

them in such manner as the Chairman or his or her designee finds necessary to apprise such persons of the protections against discrimination assured to them by section 504 and this regulation.

**§§ 6.112–6.129 [Reserved]**

**§ 6.130 General prohibitions against discrimination.**

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

(b)(1) The Commission, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Commission may not deny a qualified individual with handicaps the

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opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Commission may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Commission may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Commission; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Commission, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Commission shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

### §§ 6.131–6.139 [Reserved]

### § 6.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Commission. The

definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

### §§ 6.141–6.148 [Reserved]

### § 6.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 6.150, no qualified individuals with handicaps shall, because the Commission's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

### § 6.150 Program accessibility: Existing facilities.

(a) *General.* The Commission shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Commission to make each of its existing facilities accessible to and usable by individuals with handicaps, or

(2) Require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 6.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching

that conclusion. If an action would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens, but would, nevertheless, ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The Commission may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The Commission is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Commission, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Commission shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The Commission shall comply with the obligations established under this section by April 1, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by February 1, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Commission shall develop, by August 1, 1988, a transition plan setting forth the steps necessary to complete such changes. The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps,

to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the Commission's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

**§6.151 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

**§6.152 Program accessibility: Electronic and information technology.**

(a) When developing, procuring, maintaining, or using electronic and information technology, the Commission shall ensure, unless an undue burden would be imposed on the agency, that the electronic and information technology allows, regardless of the type of medium of the technology:

(1) Individuals with disabilities who are employees to have access to and use of information and data that is comparable to the access to and use of the information and data by employees who are not individuals with disabilities; and

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(2) Individuals with disabilities who are members of the public seeking information or services from the Commission to have access to and use of information and data that is comparable to the access to and use of the information and data by members of the public who are not individuals with disabilities.

(b) When the development, procurement, maintenance, or use of electronic and information technology that meets the standards published by the Architectural and Transportation Barriers Compliance Board pursuant to section 508(a)(2) of the Rehabilitation Act of 1973, as amended, would impose an undue burden on the Commission, the Commission shall provide individuals with disabilities covered by paragraph (a) of this section with the information and data involved by an alternative means of access that allows such individuals to use the information and data.

(c) This section shall not apply to any matter legally exempted by section 508, by the standards referenced in paragraph (b) of this section, or by other applicable law or regulation. Nothing in this section shall be construed to limit any right, remedy, or procedure otherwise available under any provision of federal law (including sections 501 through 505 of the Rehabilitation Act of 1973, as amended) that provides greater or equal protection for the rights of individuals with disabilities than section 508.

[66 FR 51863, Oct. 11, 2001]

### §§ 6.153–6.159 [Reserved]

### § 6.160 Communications.

(a) The Commission shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The Commission shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Commission.

(i) In determining what type of auxiliary aid is necessary, the Commission shall give primary consideration to the

requests of the individual with handicaps.

(ii) The Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Commission communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's), or equally effective telecommunication systems shall be used.

(b) The Commission shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Commission shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 6.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or burdens but would nevertheless ensure that, to

the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

**§§ 6.161–6.169 [Reserved]**

**§ 6.170 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791). The Commission shall apply the same procedures to process complaints alleging violations of section 508. Complaints alleging a violation of section 508 may not be filed with respect to any exempted matters as described in § 6.152(c) of this chapter, and may be filed only with respect to electronic and information technology procured by the Commission on or after June 21, 2001.

(c) Responsibility for implementation and operation of this section is vested in the Director of Equal Employment Opportunity.

(d)(1) A complete complaint under this section may be filed by any person who believes that he or she or any specific class of persons of which he or she is a member has been subjected to discrimination prohibited by this part. The complaint may also be filed by an authorized representative of any such person.

(2) The complaint must be filed within 180 days of the alleged act of discrimination unless the Director of Equal Employment Opportunity extends the time period for good cause.

(3) The complaint must be addressed to the Director of Equal Employment Opportunity, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(e) If the Director of Equal Employment Opportunity receives a complaint over which the Commission does not have jurisdiction, he or she shall

promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The Director of Equal Employment Opportunity shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) is not readily accessible to and usable by individuals with handicaps.

(g)(1) The Director of Equal Employment Opportunity shall accept and investigate a complete complaint that is filed in accordance with paragraph (d) of this section and over which the Commission has jurisdiction.

(2) If the Director of Equal Employment Opportunity receives a complaint that is not complete (see § 6.103), he or she shall, within 30 days thereafter, notify the complainant that additional information is needed. If the complainant fails to complete the complaint within 30 days of the date of the Director's notice, the Director of Equal Employment Opportunity may dismiss the complaint without prejudice.

(h) Within 180 days of the receipt of a complete complaint over which the Commission has jurisdiction, the Director of Equal Employment Opportunity shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal to the Commission's General Counsel.

(i)(1) An appeal under this section must be filed within 90 days of the complainant's receipt of the letter under paragraph (h) of this section unless the General Counsel extends the time period for good cause.

(2) The appeal must be addressed to the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(3) The appeal shall specify the questions raised by the appeal and the arguments on the points of fact and law relied upon in support of the position

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taken on each question; and it shall include copies of the complaint filed under paragraph (d) of this section and the letter by the Director of Equal Employment Opportunity under paragraph (h) of this section as well as any other material relied upon in support of the appeal.

(j) The General Counsel shall notify the complainant of the results of the appeal within 60 days of the receipt of the appeal. If the General Counsel determines that additional information is needed from the complainant, the General Counsel shall have 60 days from the date of receipt of the additional information to make a final determination on the appeal. The General Counsel may submit the appeal to the Commission for final determination provided that any final determination of the appeal is made by the Commission within the 60-day period specified by this paragraph.

(k) The time limits specified by paragraphs (h) and (j) of this section may be extended by the Chairman for good cause.

(l) The Commission may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

[52 FR 45628, Dec. 1, 1987, as amended at 66 FR 51864, Oct. 11, 2001]

### §§ 6.171-6.999 [Reserved]

## PART 14—ADMINISTRATIVE INTERPRETATIONS, GENERAL POLICY STATEMENTS, AND ENFORCEMENT POLICY STATEMENTS

Sec.

14.9 Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials.

14.12 Use of secret coding in marketing research.

14.15 In regard to comparative advertising.

14.16 Interpretation of Truth-in-Lending Orders consistent with amendments to the Truth-in-Lending Act and Regulation Z.

AUTHORITY: 15 U.S.C. 41-58.

### § 14.9 Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials.

The Federal Trade Commission has noted that, with increasing intensity, advertisers are making special efforts to reach foreign language-speaking consumers. As part of this special effort, advertisements, brochures and sales documents are being printed in foreign languages. In recent years the Commission has issued various cease-and-desist orders as well as rules, guides and other statements, which require affirmative disclosures in connection with certain kinds of representations and business activities. Generally, these disclosures are required to be “clear and conspicuous.” Because questions have arisen as to the meaning and application of the phrase “clear and conspicuous” with respect to foreign language advertisements and sales materials, the Commission deems it appropriate to set forth the following enforcement policy statement:

(a) Where cease-and-desist orders as well as rules, guides and other statements require “clear and conspicuous” disclosure of certain information in an advertisement or sales material in a newspaper, magazine, periodical, or other publication that is not in English, the disclosure shall appear in the predominant language of the publication in which the advertisement or sales material appears. In the case of any other advertisement or sales material, the disclosure shall appear in the language of the target audience (ordinarily the language principally used in the advertisement or sales material).

(b) Any respondent who fails to comply with this requirement may be the subject of a civil penalty or other law enforcement proceeding for violating the terms of a Commission cease-and-desist order or rule.

(Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

[38 FR 21494, Aug. 9, 1973, as amended at 63 FR 34808, June 26, 1998]

### § 14.12 Use of secret coding in marketing research.

(a) The Federal Trade Commission has determined to close its industry-

wide investigation of marketing research firms that was initiated in November 1975, to determine if the firms were using questionnaires with invisible coding that could be used to reveal a survey respondent's identity. After a thorough investigation, the Commission has determined that invisible coding has been used by the marketing research industry, but it is neither a commonly used nor widespread practice. Moreover, use of the practice appears to have diminished in recent years. For these reasons, the Commission has determined that further action is not warranted at this time.

(b) However, for the purpose of providing guidance to the marketing research industry, the Commission is issuing the following statement with regard to its future enforcement intentions. The Commission has reason to believe that it is an unfair or deceptive act or practice, violative of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to induce consumers to provide information about themselves by expressly or implicitly promising that such information is being provided anonymously, when, in fact, a secret or invisible code is used on the survey form or return envelope that allows identification of the consumer who has provided the information.

(c) While the Commission has made no final determination regarding the legality of the foregoing practice, the Commission will take appropriate enforcement action should it discover the practice to be continuing in the future, and in the event that it may be causing substantial consumer injury. Among the circumstances in which the Commission believes that the use of secret coding may cause significant consumer harm are those in which:

(1) A misleading promise of anonymity is used to obtain highly sensitive information about a consumer that such consumer would not choose to disclose if he or she were informed that a code was being used that would allow his or her name to be associated with the response; and

(2) Information of any sort is used for purposes other than those of the market survey.

[43 FR 42742, Sept. 21, 1978]

#### § 14.15 In regard to comparative advertising.

(a) *Introduction.* The Commission's staff has conducted an investigation of industry trade associations and the advertising media regarding their comparative advertising policies. In the course of this investigation, numerous industry codes, statements of policy, interpretations and standards were examined. Many of the industry codes and standards contain language that could be interpreted as discouraging the use of comparative advertising. This Policy Statement enunciates the Commission's position that industry self-regulation should not restrain the use by advertisers of truthful comparative advertising.

(b) *Policy Statement.* The Federal Trade Commission has determined that it would be of benefit to advertisers, advertising agencies, broadcasters, and self-regulation entities to restate its current policy concerning comparative advertising.<sup>1</sup> Commission policy in the area of comparative advertising encourages the naming of, or reference to competitors, but requires clarity, and, if necessary, disclosure to avoid deception of the consumer. Additionally, the use of truthful comparative advertising should not be restrained by broadcasters or self-regulation entities.

(c) The Commission has supported the use of brand comparisons where the bases of comparison are clearly identified. Comparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. For these reasons, the Commission will continue to scrutinize carefully restraints upon its use.

(1) *Disparagement.* Some industry codes which prohibit practices such as "disparagement," "disparagement of

<sup>1</sup>For purposes of this Policy Statement, comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.

competitors,” “improper disparagement,” “unfairly attaching,” “discrediting,” may operate as a restriction on comparative advertising. The Commission has previously held that disparaging advertising is permissible so long as it is truthful and not deceptive. In *Carter Products, Inc.*, 60 F.T.C. 782, *modified*, 323 F.2d 523 (5th Cir. 1963), the Commission narrowed an order recommended by the hearing examiner which would have prohibited respondents from disparaging competing products through the use of false or misleading pictures, depictions, or demonstrations, “or otherwise” disparaging such products. In explaining why it eliminated “or otherwise” from the final order, the Commission observed that the phrase would have prevented:

respondents from making truthful and non-deceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess. Such a comparison may have the effect of disparaging the competing product, but we know of no rule of law which prevents a seller from honestly informing the public of the advantages of its products as opposed to those of competing products. 60 F.T.C. at 796.

Industry codes which restrain comparative advertising in this manner are subject to challenge by the Federal Trade Commission.

(2) *Substantiation*. On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self-regulation entities. The Commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques. The ultimate question is whether or not the advertising has a tendency or capacity to be false or deceptive. This is a factual issue to be determined on a case-by-case basis. However, industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised.

(Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)  
[44 FR 47328, Aug. 13, 1979]

#### **§ 14.16 Interpretation of Truth-in-Lending Orders consistent with amendments to the Truth-in-Lending Act and Regulation Z.**

##### *Introduction*

The Federal Trade Commission (FTC) has determined that there is a need to clarify the compliance responsibilities under the Truth-in-Lending Act (TILA) (Title I, Consumer Credit Protection Act, 15 U.S.C. 1601 et seq.), as amended by the Truth-in-Lending Simplification and Reform Act of 1980 (Pub. L. 96-221, 94 Stat. 168), and under revised Regulation Z (12 CFR part 226, 46 FR 20848), and subsequent amendments to the TILA and Regulation Z, of those creditors and advertisers who are subject to final cease and desist orders that require compliance with provisions of the Truth-in-Lending statute or Regulation Z. Clarification is necessary because the Truth-in-Lending Simplification and Reform Act and revised Regulation Z significantly relaxed prior Truth-in-Lending requirements on which provisions of numerous outstanding orders were based. The Policy Statement provides that the Commission will interpret and enforce Truth-in-Lending provisions of all orders so as to impose no greater or different disclosure obligations on creditors and advertisers named in such orders than are required generally of creditors and advertisers under the TILA and Regulation Z, and subsequent amendments to the TILA and Regulation Z.

##### *Policy Statement*

(a) All cease and desist orders issued by the FTC that require compliance with provisions of the Truth-in-Lending Act and Regulation Z (12 CFR part 226) will be interpreted and enforced consistent with the amendments to the TILA incorporated by the Truth-in-Lending Simplification and Reform Act of 1980, and the revision of Regulation Z implementing the same, promulgated on April 1, 1981 by the Board of Governors of the Federal Reserve System (46 FR 20848), and by subsequent amendments to the TILA and Regulation Z. Likewise, the Federal Reserve Board staff commentary to revised Regulation Z (46 FR 50288, October 9, 1981), and subsequent revisions to the

Federal Reserve Board staff commentary to Regulation Z, will be considered in interpreting the requirements of existing orders.

(b) After an amendment to Regulation Z becomes effective, compliance with the revised credit disclosure requirements will be considered compliance with the existing order, and:

(1) To the extent that revised Regulation Z deletes disclosure requirements imposed by any Commission order, compliance with these requirements will no longer be required; however,

(2) To the extent that revised Regulation Z imposes additional disclosure or format requirements, a failure to comply with the added requirements will be considered a violation of the TILA.

(c) A creditor or advertiser must continue to comply with all provisions of the order which do not relate to Truth-in-Lending Act requirements or are unaffected by Regulation Z. These provisions are not affected by this policy statement and will remain in full force and effect.

#### *Staff Clarifications*

The Commission intends that this Enforcement Policy Statement obviate the need for any creditor or advertiser to file a petition to reopen and modify any affected order under section 2.51 of the Commission's rules of practice (16 CFR 2.51). However, the Commission recognizes that the policy statement may not provide clear guidance to every creditor or advertiser under order. The staff of the Division of Enforcement, Bureau of Consumer Protection, will respond to written requests for clarification of any order affected by this policy statement.

[60 FR 42033, Aug. 15, 1995]

## **PART 16—ADVISORY COMMITTEE MANAGEMENT**

Sec.

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AUTHORITY: Federal Advisory Committee Act, 5 U.S.C. App. I Section 8(a).

SOURCE: 51 FR 30055, Aug. 22, 1986, unless otherwise noted.

### **§ 16.1 Purpose and scope.**

(a) The regulations in this part implement the Federal Advisory Committee Act, 5 U.S.C. App. I.

(b) These regulations shall apply to any advisory committee, as defined in paragraph (b) of § 16.2 of this part. However, to the extent that an advisory committee is subject to particular statutory provisions that are inconsistent with the Federal Advisory Committee Act, these regulations do not apply.

### **§ 16.2 Definitions.**

For purposes of this part:

(a) *Administrator* means the Administrator of the General Services Administration.

(b) *Advisory committee*, subject to exclusions described in paragraph (b)(2) of this section, means any committee, board, commission, council, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, which is established or utilized by the Commission for the purpose of obtaining advice or recommendations for the Commission or other agency or officer of the Federal Government on matters that are within the scope of the Commission's jurisdiction.

(1) Where a group provides some advice to the Commission but the group's advisory function is incidental and inseparable from other (e.g., operational or management) functions, the provisions of this part do not apply. However, if the advisory function is separable, the group is subject to this part to the extent that the group operates as an advisory committee.

(2) Groups excluded from the effect of the provisions of this part include:

(i) Any committee composed wholly of full-time officers or employees of the Federal Government;

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(ii) Any committee, subcommittee or subgroup that is exclusively operational in nature (e.g., has functions that include making or implementing decisions, as opposed to the offering of advice or recommendations);

(iii) Any inter-agency advisory committee unless specifically made applicable by the establishing authority.

(c) *Commission* means the Federal Trade Commission.

(d) *GSA* means the General Services Administration.

(e) *Secretariat* means the Committee Management Secretariat of the General Services Administration.

(f) *Sunshine Act* means the Government in the Sunshine Act, 5 U.S.C. 552b.

### § 16.3 Policy.

(a) The Commission's policy shall be to:

(1) Establish an advisory committee only when it is essential to the conduct of agency business;

(2) Insure that adequate information is provided to the Congress and the public regarding advisory committees, and that there are adequate opportunities for access by the public to advisory committee meetings;

(3) Insure that the membership of the advisory committee is balanced in terms of the points of view represented and the functions to be performed; and

(4) Terminate an advisory committee whenever the stated objectives of the committee have been accomplished; the subject matter or work of the advisory committee has become obsolete; the cost of operating the advisory committee is excessive in relation to the benefits accruing to the Commission; or the advisory committee is otherwise no longer a necessary or appropriate means to carry out the purposes for which it was established.

(b) No advisory committee may be used for functions that are not solely advisory unless specifically authorized to do so by law. The Commission shall be solely responsible for making policy decisions and determining action to be taken with respect to any matter considered by an advisory committee.

### § 16.4 Advisory Committee Management Officer.

(a) The Commission shall designate the Executive Director as the Advisory Committee Management Officer who shall:

(1) Exercise control and supervision over the establishment, procedures, and accomplishments of the advisory committees established by the Commission;

(2) Assemble and maintain the reports, records, and other papers of any advisory committee during its existence;

(3) Carry out, on behalf of the Commission, the provisions of the Freedom of Information Act, 5 U.S.C. 552, with respect to such reports, records, and other papers;

(4) Maintain in a single location a complete set for the charters and membership lists of each of the Commission's advisory committees;

(5) Maintain information on the nature, functions, and operations of each of the Commission's advisory committees; and

(6) Provide information on how to obtain copies of minutes of meetings and reports of each of the Commission's advisory committees.

(b) The name of the Advisory Committee Management Officer designated in accordance with this part, and his or her agency address and telephone number, shall be provided to the Secretariat.

### § 16.5 Establishment of advisory committees.

(a) No advisory committee shall be established under this part unless such establishment is:

(1) Specifically authorized by statute; or

(2) Determined as a matter of formal record by the Commission, after consultation with the Administrator, to be in the public interest in connection with the performance of duties imposed on the Commission by law.

(b) In establishing an advisory committee, the Commission shall:

(1) Prepare a proposed charter for the advisory committee in accordance with § 16.6 of this part; and

(2) Submit an original and one copy of a letter to the Administrator requesting concurrence in the Commission's proposal to establish an advisory committee. The letter from the Commission shall describe the nature and purpose of the proposed advisory committee, including an explanation of why establishment of the advisory committee is essential to the conduct of agency business and in the public interest and why the functions of the proposed committee could not be performed by the Commission, by an existing committee, or through other means. The letter shall also describe the Commission's plan to attain balanced membership on the proposed advisory committee in terms of points of view to be represented and functions to be performed. The letter shall be accompanied by two copies of the proposed charter.

(c) Upon the receipt of notification from the Administrator of his or her concurrence or nonconcurrence, the Commission shall notify the Administrator in writing that either:

(1) The advisory committee is being established. The filing of an advisory committee charter as specified in §16.6 of this part shall be deemed appropriate written notification in this instance; or

(2) The advisory committee is not being established.

(d) If the Commission determines that an advisory committee should be established in accordance with paragraph (c) of this section, the Commission shall publish notice to that effect in the *FEDERAL REGISTER* at least fifteen days prior to the filing of the advisory committee's charter unless the Administrator authorizes publication of such notice within a shorter period of time. The notice shall identify the name and purpose of the advisory committee, state that the committee is necessary and in the public interest, and identify the name and address of the Commission official to whom the public may submit comments.

(e) The Commission may issue regulations or guidelines as may be necessary to operate and oversee a particular advisory committee.

**§ 16.6 Charter.**

(a) No advisory committee established, utilized, reestablished or renewed by the Commission under this part shall meet or take any action until its charter has been filed by the Commission with the standing committees of the Senate and House of Representatives having legislative jurisdiction over the Commission.

(b) The charter required by paragraph (a) of this section shall include the following information:

(1) The committee's official designation;

(2) The committee's objectives and the scope of its activity;

(3) The period of time necessary for the committee to carry out its purposes;

(4) The Commission component or official to whom the committee reports;

(5) The agency or official responsible for providing the necessary support for the committee;

(6) A description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(7) The estimated annual operating cost in dollars and man-years for the committee;

(8) The estimated number and frequency of committee meetings;

(9) The committee's termination date, if less than two years from the date of committee's establishment; and

(10) The date the charter is filed.

(c) A copy of the charter required by paragraph (a) of this section shall also be furnished at the time of filing to the Secretariat and the Library of Congress.

(d) The requirements of this section shall also apply to committees utilized as advisory committees, even though not expressly established for that purpose.

**§ 16.7 Meetings.**

(a) The Commission shall designate an officer or employee of the Federal Government as the Designated Federal Officer for the advisory committee. The Designated Federal Officer shall attend the meetings of the advisory

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committee, and shall adjourn committee meetings whenever he or she determines that adjournment is in the public interest. The Commission, in its discretion, may authorize the Designated Federal Officer to chair meetings of the advisory committee.

(b) No meeting of any advisory committee shall be held except at the call of, or with the advance approval of, the Designated Federal Officer and with an agenda approved by such official.

(c) The agenda required by paragraph (b) of this section shall identify, in general terms, matters to be considered at the meeting and shall indicate whether any part of the meeting will concern matters that the General Counsel has determined to be covered by one or more of the exemptions of the Sunshine Act.

(d) Timely notice of each meeting of the advisory committee shall be provided in accordance with §16.9 of this part.

(e) Subject to the provisions of §16.8 of this part, each meeting of an advisory committee as defined in §16.2(b) of this part shall be open to the public. Subcommittees and subgroups that are not utilized by the Commission for the purpose of obtaining advice or recommendations do not constitute advisory committees within the meaning of §16.2(b) and are not subject to the meeting and other requirements of this part.

(f) Meetings that are completely or partly open to the public shall be held at reasonable times and at places that are reasonably accessible to members of the public. The size of the meeting room shall be sufficient to accommodate members of the public who can reasonably be expected to attend.

(g) Any member of the public shall be permitted to file a written statement with the committee concerning any matter to be considered in a meeting. Interested persons may be permitted by the committee chairman to speak at such meetings in accordance with procedures established by the committee and subject to the time constraints under which the meeting is to be conducted.

(h) No meeting of any advisory committee shall be held in the absence of a quorum. Unless otherwise established

by statute or in the charter of the committee, a quorum shall consist of a majority of the committee's authorized membership.

### § 16.8 Closed meetings.

(a) Paragraphs (e), (f), and (g) of §16.7 of this part, which require that meetings shall be open to the public and that the public shall be afforded an opportunity to participate in such meetings, shall not apply to any advisory committee meeting (or any portion thereof) which the Commission determines is concerned with any matter covered by one or more of the exemptions set forth in paragraph (c) of the Sunshine Act, 5 U.S.C. section 552b(c).

(b) An advisory committee that seeks to have all or part of its meeting closed shall notify the Commission at least thirty days before the scheduled date of the meeting. The notification shall be in writing and shall identify the specific provisions of the Sunshine Act which justify closure. The Commission may waive the thirty-day requirement when a lesser period of time is requested and justified by the advisory committee.

(c) The General Counsel shall review all requests to close meetings and shall advise the Commission on the disposition of each such request.

(d) If the Commission determines that the request is consistent with the policies of the Sunshine Act and the Federal Advisory Committee Act, it shall issue a determination that all or part of the meeting may be closed. A copy of the Commission's determination shall be made available to the public upon request.

(e) The advisory committee shall issue, on an annual basis, a report that sets forth a summary of its activities in meetings closed pursuant to this section, addressing those related matters as would be informative to the public and consistent with the policy of the Sunshine Act and of this part. Notice of the availability of such annual reports shall be published in accordance with §16.15 of this part.

### § 16.9 Notice of meetings.

(a) Notice of each advisory committee meeting, whether open or closed to the public, shall be published in the

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FEDERAL REGISTER at least 15 days before the meeting date. Such notice shall include the exact name of the advisory committee as chartered; the time, date, place and purpose of the meeting; and a summary of the meeting agenda. Notice shall also state that the meeting is open to the public or closed in whole or in part, and, if closed, cite the specific exemptions of the Sunshine Act as the basis for closure. The Commission may permit the advisory committee to provide notice of less than fifteen days in extraordinary situations, provided that the reasons for doing so are included in the meeting notice.

(b) In addition to the notice required by paragraph (a) of this section, other forms of notice such as press releases and notices in professional journals may be used to inform interested members of the public of advisory committee meetings.

### § 16.10 Minutes and transcripts of meetings.

(a) Detailed minutes of each advisory committee meeting shall be kept. The minutes shall reflect the time, date and place of the meeting; and accurate summary of each matter that was discussed and each conclusion reached; and a copy of each report or other document received, issued, or approved by the advisory committee. In addition, the minutes shall include a list of advisory committee members and staff and full-time Federal employees who attended the meeting; a list of members of the public who presented oral or written statements; and an estimated number of members of the public who were present at the meeting. The minutes shall describe the extent to which the meeting was open to the public and the nature and extent of any public participation. If it is impracticable to attach to the minutes of the meeting any document received, issued, or approved by the advisory committee, then the minutes shall describe the document in sufficient detail to enable any person who may request the document to identify it readily.

(b) The accuracy of all minutes shall be certified to by the chairperson of the advisory committee.

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(c) Minutes need not be kept if a verbatim transcript is made.

### § 16.11 Annual comprehensive review.

(a) The Commission shall conduct an annual comprehensive review of the activities and responsibilities of each advisory committee to determine:

(1) Whether such committee is carrying out its purpose;

(2) Whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) Whether it should be merged with any other advisory committee or committees; or

(4) Whether it should be abolished.

(b) Pertinent factors to be considered in the comprehensive review required by paragraph (a) of this section include the following:

(1) The number of times the committee has met in the past year;

(2) The number of reports or recommendations submitted by the committee;

(3) An evaluation of the substance of the committee's reports or recommendations with respect to the Commission's programs or operations;

(4) An evaluation (with emphasis on the preceding twelve month period of the committee's work) of the history of the Commission's utilization of the committee's recommendations in policy formulation, program planning, decision making, more effective achievement of program objectives, and more economical accomplishment of programs in general.

(5) Whether information or recommendations could be obtained from sources within the Commission or from another advisory committee already in existence;

(6) The degree of duplication of effort by the committee as compared with that of other parts of the Commission or other advisory committees; and

(7) The estimated annual cost of the committee.

(c) The annual review required by this section shall be conducted on a fiscal year basis, and results of the review shall be included in the annual report to the GSA required by § 16.15 of this part. The report shall contain a justification of each advisory committee

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which the Commission determines should be continued, making reference, as appropriate, to the factors specified in paragraph (b) of this section.

### **§ 16.12 Termination of advisory committees.**

Any advisory committee shall automatically terminate not later than two years after it is established, reestablished, or renewed, unless:

- (a) Its duration is otherwise provided by law;
- (b) It is renewed in accordance with § 16.13 of this part; or
- (c) The Commission terminates it before that time.

### **§ 16.13 Renewal of advisory committees.**

(a) Any advisory committee established under this part may be renewed by appropriate action of the Commission and the filing of a new charter. An advisory committee may be continued by such action for successive two-year periods.

(b) Before it renews an advisory committee in accordance with paragraph (a) of this section, the Commission will inform the Administrator by letter, not more than sixty days nor less than thirty days before the committee expires, of the following:

- (1) Its determination that a renewal is necessary and in the public interest;
- (2) The reasons for its determination;
- (3) The Commission's plan to maintain balanced membership on the committee;
- (4) An explanation of why the committee's functions cannot be performed by the Commission or by an existing advisory committee.

(c) Upon receipt of the Administrator's notification of concurrence or nonconcurrence, the Commission shall publish a notice of the renewal in the FEDERAL REGISTER, which shall certify that the renewal of the advisory committee is in the public interest and shall include all the matters set forth in paragraph (b) of this section. The Commission shall cause a new charter to be prepared and filed in accordance with the provisions of §§ 16.5 and 16.6 of this part.

(d) No advisory committee that is required under this section to file a new

charter for the purpose of renewal shall take any action, other than preparation and filing of such charter, between the date the new charter is required and the date on which such charter is actually filed.

### **§ 16.14 Amendments.**

(a) The charter of an advisory committee may be amended when the Commission determines that the existing charter no longer accurately describes the committee itself or its goals or procedures. Changes may be minor, such as revising the name of the advisory committee, or may be major, to the extent that they deal with the basic objectives or composition of the committee.

(1) To make a minor amendment to an advisory committee charter, the Commission shall:

- (i) Amend the charter language as necessary; and
- (ii) File the amended charter in accordance with the provisions of § 16.6 of this part.

(2) To make a major amendment to an advisory committee charter, the Commission shall:

- (i) Amend the charter language as necessary;
- (ii) Submit the proposed amended charter with a letter to the Administrator requesting concurrence in the amended language and an explanation of why the changes are essential and in the public interest; and
- (iii) File the amended charter in accordance with the provisions of § 16.6 of this part.

(b) Amendment of an existing charter does not constitute renewal of the advisory committee under § 16.13 of this part.

### **§ 16.15 Reports of advisory committees.**

(a) The Commission shall furnish, on a fiscal year basis, a report of the activities of each of its advisory committees to the GSA.

(b) Results of the annual comprehensive review of the advisory committee made under § 16.11 shall be included in the annual report.

(c) The Commission shall notify the GSA, by letter, of the termination of, changes in the membership of, or other

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significant developments with respect to, an advisory committee.

### § 16.16 Compensation.

(a) *Committee members.* Unless otherwise provided by law, the Commission shall not compensate advisory committee members for their service on an advisory committee. In the exceptional case where the Commission is unable to meet the need for technical expertise or the requirement for balanced membership solely through the appointment of noncompensated members, the Commission may contract for or authorize the advisory committee to contract for the services of a specific consultant who may be appointed as a member of the advisory committee. In such a case, the Commission shall follow the procedures set forth in paragraph (b) of this section.

(b) *Consultants.* Prior to hiring or authorizing the advisory committee to hire a consultant to an advisory committee, the Commission shall determine that the expertise or viewpoint to be offered by the consultant is not otherwise available without cost to the

Commission. The compensation to be paid to such consultant may not exceed the maximum rate of pay authorized by 5 U.S.C. section 3109. Hiring of consultants shall be in accordance with OMB Circular A–120 and applicable statutes, regulations, and Executive Orders.

(c) *Staff members.* The Commission may fix the pay of each advisory committee staff member at a rate of the General Schedule, General Management Schedule, or Senior Executive Service in which the Staff member's position would appropriately be placed (5 U.S.C. chapter 51). The Commission may not fix the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS–15, unless the Commission has determined that under the General Schedule, General Management Schedule, or Senior Executive Service classification system, the staff member's position would appropriately be placed at a grade higher than GS–15. The Commission shall review this determination annually.